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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931

No. [redacted] 5

THE NEW YORK CENTRAL SECURITIES CORPORATION,
Appellant,

v.

THE UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, THE NEW YORK CENTRAL RAILROAD COMPANY, THE CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY, and THE MICHIGAN CENTRAL RAILROAD COMPANY,
Appellees.

BRIEF FOR APPELLANT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

THE NEW YORK CENTRAL SECURITIES CORPORATION, Appellant, v. THE UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, THE NEW YORK CENTRAL RAILROAD COMPANY, THE CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY and THE MICHIGAN CENTRAL RAILROAD COMPANY, Appellees.	No. 707.

BRIEF FOR APPELLANT.

Statement.

History and Status of the Case.

This is an appeal (R. 226-241) from the District Court of the United States for the Southern District of New York, in which appellant, The New York Central Securities Corporation, seeks a review of the final decree filed June 24, 1931 (R. 212-213), of a special "three-judge" court, dismiss-

ing upon the merits, with an opinion (R. 185-200) and findings of fact and conclusions of law (R. 200-212), appellant's petition (R. 6-23) in a suit, *N. Y. Cen. Securities Corp.* v. *U. S. et al.*, 54 Fed. (2d) 122, commenced in said Court August 21, 1929, to set aside and annul two cognate orders (R. 100-101, 121-122) of the Interstate Commerce Commission, the first of which authorized, among other things, the proposed acquisition by The New York Central Railroad Company of control by lease, under U. S. C., Title 49, Section 5 (2), of the systems of the other appellee railroads, the "Big Four" and the Michigan Central (R. 31-101; Finance Docket No. 5690, with which was reported the Big Four's ancillary proceeding, F. D. No. 5688; *New York Central Unification,* 150 I. C. C. 278, being the report and findings, with condition as to "short lines," made on January 14, 1929, "by the Commission," Commissioners Eastman, McManamy and Taylor dissenting; and 154 I. C. C. 489, being the supplemental report and final order made in the same case on July 2, 1929, by the Commission, the same Commissioners dissenting); and the second order authorized under U. S. C., Title 49, Section 20a, the assumption by the lessee of obligation and liability in respect of the securities of the lessors (R. 121-122, 148-155; F. D. No. 7744, with which was reported the Big Four's ancillary proceeding, F. D. No. 7745; *Assumption of Obligation & Liability by New York Central,* 158 I. C. C. 317, decided December 2, 1929, by Division 4, Commissioners Meyer, Eastman and Woodlock).

The jurisdiction of this Court is shown in the separate Jurisdictional Statement already filed herein.

The jurisdiction of the special District Court (R. 7, 8, 102, 185, 201) was duly invoked by the filing of a petition, and by subsequent proceedings taken, pursuant to U. S. C., Title 28, Section 41, subdivision 28, and Sections 43 to 48, inclusive. All the defendants appeared and answered upon the merits both the original (R. 6, 24, 28, 101) and supplemental (R. 117, 144, 158, 160) petitions, and thereby waived objections to the venue, or local jurisdiction, and to all other modal matters (*McLean Lumber Co.* v. *U. S.*, 237 Fed. 460,

464; *cf. Home Furniture Co.* v. *U. S.*, 271 U. S. 456, and *State of La.* v. *Morgan's La. & T. R. & S. S. Co.*, 18 Fed. [2d] 645, 648).

The right of appellant, suing as a minority stockholder and investor in each of appellee corporations, to invoke such special jurisdiction of the District Court, as well as the appropriateness of the grounds asserted and relief demanded for cognizance by such Court in the circumstances of this case, will be shown herein directly after a recital of the facts and of appellant's contentions (*infra*, p. 23). Motions by the Commission and by the United States to dismiss for want of jurisdiction were in effect, except as to some issues, overruled by the District Court (R. 162-163, 188-189). Appellee intervened in the respective proceedings before the Commission and it there urged the same contentions that it later urged in the District Court and now urges here (R. 74-83, 9-20, 107-112). Its ownership of stock in all of said companies, and the allied ownership of shares in the New York Central and Michigan Central by others whom it properly represents and for whom also it sues, is admitted (R. 10, 104), as is also the fact that such ownership antedates any action taken on the part of the railroads for the making of the proposed leases (R. 9-10, 3-4). As a stockholder entitled to equal and fair treatment; as an investor entitled to the protection of its interests adversely affected by a reorganization or acquisition of control authorized by the Commission; and as an intervener before the Commission seeking such equality and protection, this appellant was entitled to maintain its suit before the special District Court, and to have full relief, including a restoration of the *status quo ante*, so far as required for the preservation of its rights, *Chicago Junction Case*, 264 U. S. 258, 267-268, 269-270; *McLean Lumber Co.* v. *U. S.*, 237 Fed. 460, 467.

The Facts.

(a) *Organization and Situs of the Railroads.*—The New York Central Railroad Company is a railroad corporation of the States of New York, Pennsylvania, Ohio, Michigan, Indiana and Illinois, formed in 1914 by the consolidation of eleven carrier companies, including the New York Central & Hudson River Railroad Company and the Lake Shore & Michigan Southern Railway Company (R. 7, 25, 28, 102; I. C. C. Rec., F. D. No. 5690; Witness Stephenson's Ex. 1).

The Big Four is a railway corporation of the States of Ohio and Indiana formed in 1889 by the consolidation of three constituent companies (*Id.*, and Stephenson's Ex. 2).

The Michigan Central is a railroad corporation of the State of Michigan (*Id.*, and p. 38 of Witness Horst's Ex. 40 and Stephenson's Ex. 3).

(b) *Stock Control of Lessors by Lessee.*—As of December 31, 1926, the New York Central owned 84,681 shares of the preferred stock of the Big Four, of a par value of $8,468,100, which is 84.694 per cent. of the total amount of such preferred stock outstanding, namely, 99,985 shares. It also owned 429,411 shares of the common stock of that company of a par value of $42,941,100, which is 91.308 per cent. of the total amount of such common stock outstanding, namely, 470,287 shares. The New York Central also owned 185,762 shares of the capital stock of the Michigan Central of a par value of $18,576,200, which is 99.145 per cent. of the total amount of such stock outstanding, namely, 187,364 shares. These percentages have been increased by purchases from individual minority stockholders both before and since the District Court's decision. The New York Central also owned 40 per cent. of the total outstanding capital stock of the Chicago, Kalamazoo & Saginaw Railway Company, the remaining 60 per cent. of such outstanding capital stock being owned by the Michigan Central. The entire capital stock of Evansville, Indianapolis & Terre Haute Railway Company was owned by the Big Four, which also owned 97.72 per

cent. of the outstanding capital stock of the Cincinnati Northern Railway Company (R. 11, 104; I. C. C. Rec., F. D. No. 5690; Witness Porter's Ex. 35; Application of New York Central, pp. 4-5; Application of Big Four, p. 4).

(c) *Network of Railways Under Single Control.*—The proposed lessor and lessee lines constitute the major portion of the system known as the New York Central Lines (I. C. C. Rec., F. D. No. 5690; Crowley, p. 550).

The key map (*Id.*, Map No. 1 of Witness Voorhees' Ex. 41) shows that the New York Central (shown in red on said map) owns and operates a railroad extending from New York City to Buffalo, and thence along the southern shore of Lake Erie and through northern Pennsylvania, Ohio, Indiana and Illinois to Chicago, with numerous owned or leased lines in all of said states, other states and the Dominion of Canada.

The Big Four (shown in green on said map) owns and operates a railroad extending from a connection with the New York Central at Cleveland to Columbus, Cincinnati, Indianapolis, St. Louis and Chicago; with other terminal points and numerous branch lines, owned or leased.

The Michigan Central (shown in purple on said map) owns or leases and operates a railroad which extends from Buffalo along the north side of Lake Erie and through the Dominion of Canada, the southern Michigan peninsula, and along the southern part of Michigan to Chicago, and from Detroit, Mich., to Toledo, Ohio, together with other terminal points and numerous branch lines in Michigan, Ohio, Indiana and Illinois.

The Chicago, Kalamazoo & Saginaw Railway Company (shown in yellow on said map) operates a line extending from Woodbury, Mich., through Kalamazoo, Mich., with additional mileage extending from Pavilion Junction to Pavilion, Mich.

The Cincinnati Northern Railroad Company (shown in brown on said map) operates a line extending from Jackson, Mich., to Franklin, Ohio, and thence by trackage over the

Big Four to Cincinnati. It connects with the New York Central lines at Bryan, Ohio, and with the Michigan Central's main line at Jackson, Mich.

The Evansville, Indianapolis & Terre Haute Railway Company (shown in blue on said map) operates a line extending in a northerly and southerly direction between Evansville and Terre Haute, Ind., connecting with the Big Four at Terre Haute.

The railroads and properties of the Cincinnati Northern Railroad Company and of the Evansville, Indianapolis & Terre Haute Railway Company are controlled through stock ownership by, and will (subject to the Commission's authorization) be leased to, the Big Four. Thereupon such proposed leaseholds will be transferred to the New York Central (R. 9, 103).

(d) *Parallel and Competing Lines.*—Upon the consummation of all the leases, including the proposed direct leases of the Big Four and Michigan Central to the New York Central, the latter will own in fee or under lease and will operate as one railroad system many parallel and hitherto competing lines, including the three separate rail routes of the New York Central and the Michigan Central between Toledo, Ohio, and Chicago, Ill.; the two distinct trunk lines of the New York Central and the Michigan Central between Buffalo, N. Y., and Chicago, Ill.; the two distinct lines of the New York Central and the Michigan Central between Detroit, Mich., and Toledo, Ohio; and the two rail routes of the New York Central and the Big Four between Cleveland, Ohio, and Chicago, Ill.; with many other and intermediate intersections and interconnections of competing lines of the parties to the proposed leases (R. 9, 103).

There are twenty two junction points where traffic is interchanged between the New York Central and the Michigan; two where traffic is interchanged between the Big Four and the Michigan Central; two where traffic is interchanged between the Kalamazoo and the Michigan Central; and one where traffic is interchanged between the Cincinnati North-

ern and the Michigan Central (I. C. C. Rec. F. D. No. 5690; Witness Voorhees' Ex. 1, and pp. 113 and 117).

There are twenty junction points where traffic is interchanged between the Big Four and the New York Central; five where traffic is interchanged between the Big Four and the Cincinnati Northern; and one where traffic is interchanged between the Big Four and the Terre Haute (*Id.*, Voorhees' Exs. 41, 43, and pp. 116 and 117).

The yearly interchange between the proposed lessor and lessee lines, during the year ending September 30, 1926, amounted to 1,193,472 loads and 786,231 empties, or a total of 1,979,703 cars. The daily average interchange of cars during an eight-day test period, ending March 23, 1926, between the Big Four and the New York Central, was 2,324 cars; between the New York Central and the Cincinnati Northern, 59 cars; between the New York Central and the Michigan Central, 1,741 cars; between the New York Central and the Kalamazoo, 23 cars; between the Big Four and the Michigan Central, 396 cars; between the Big Four and the Cincinnati Northern, 442 cars; between the Big Four and the Terre Haute, 395 cars; between the Michigan Central and the Cincinnati Northern, 247 cars; and between the Michigan Central and the Kalamazoo, 75 cars (*Id.*, Vorhees' Ex. 43).

(e) *Reasons for Acquisition of Control by Lease.*—In the application of the New York Central for authority to acquire control under lease, it was alleged (*Id.*, pp. 2, 3) that the acquisition of control would be in the public interest for the reasons, among others:

> "The lines of railroad now operated by the applicant and those proposed to be operated by it under the provisions of the proposed leases are now operated as parts of the New York Central Lines system, of which the applicant is the parent company. Through the proposed leases economies will be effected and increased efficiency and improved service will result in the administration and operation of the said lines of railroad."

The petition alleges common control by the New York Central and the answer of the railroads admits that all of the railways and systems involved in the proposed leases are now being operated in common control with the New York Central under the common designation, "The New York Central Lines," with substantially identical or closely interlocking boards of directors and certain common administrative or executive officers (R. 11-12, 105).

The economies which it is anticipated will be effected are, in forwarding freight along the most economical route, to the extent that the shipper leaves the route open (I. C. C. Rec., F. D. No. 5690; Crowley, pp. 551, 552; Ingalls, pp. 141-148; Webster, pp. 174-218); in transportation operations (*Id.*, White, pp. 226-259; Evans, pp. 281-286); in the accounting department (Wishart, pp. 271-277); and in repair of equipment (*Id.*, Hardin, pp. 288-293).

(f) *Terms and Conditions of the Leases.*—The proposed leases are annexed to the application (*Id.*). Each is for ninety-nine years (Big Four Lease, p. 18; Michigan Central Lease, p. 14). The lessee agrees to pay the lessor's fixed charges (Art. II), and to stockholders, other than the lessee (*i. e.*, to minority stockholders), an amount equal to dividends on the preferred stock of the Big Four and an amount equal to $10 per share per annum on the common stock of the Big Four, and $50 per share per annum on the stock of the Michigan Central (Art. II, subd. 5), with separate provision as to Michigan Central stock pledged as collateral security. The "Ratio of Rentals to Average Net Earnings" for the years 1922-1927 is, for Big Four common stock, 50 per cent., and for Michigan Central stock, 58 per cent., as shown to the Commission by applicant's tabular exhibit reproduced in the Commission's report and the District Court's opinion (R. 81, 194). The latter ratio is considerably changed by taking instead the six years ending with 1929. All cash and current assets of the lessor are included in the lease, any balance thereof, after application thereof to the payment of existing current and deferred liabilities of the lessor, to be restored on the termination of the lease (Art. IV). The

lessee is to maintain the leased properties in repair (Art. VII, subd. b), but all betterments are to be at the cost of the lessor (Art. VIII, Sec. 4; Art. IX, Secs. 1-4). The lessee is authorized to abandon, retire, sell or otherwise dispose of any line or lines of railway and any material, equipment or other tangible personal property not required in its judgment for the proper operation and maintenance of the demised premises, and any lands, buildings, structures or facilities no longer required for such operation. Consent of lessor's board is required for disposal of essential parts of leased lines or the voting of lessor's holdings of subsidiaries' securities for the disposal of their lines. Proceeds are to be applied for the improvement of the leased property, and balance of such account either way is payable in cash at expiry of the lease (R. 105-106; Big Four Lease, Art. VI, Sec. 3; Michigan Central Lease, Art. V, Sec. 3); and lessee may extend or change the leased lines (Sec. 2).

(g) *Michigan Central's Net Income Per Share.*—From January 1, 1923, to December 31, 1928, the net income per share of the Michigan Central available for dividends, and the amount of dividends paid from such net income in each year, have been as follows (R. 16, 109-110, 171):

Year	*Net Income Per Share*	*Dividends Paid Per Share*
1923	$ 75.66	$20.00
1924	72.73	20.00
1925	100.37	27.50
1926	101.21	35.00
1927	90.02	40.00
1928	103.49	40.00
1929	103.20	40.00

Its surplus on January 1, 1915, was $16,709,236; on April 30, 1926, it was $82,779,597; and as of December 31, 1928, it was $100,428,397 (R. 110). The average annual net income for the five years (1925-1929) preceding the lease was $99.66 per share.

(h) *Value of Michigan Central Stock.*—In proceedings before the Commission for the valuation of the Michigan Central, certain tentative values as of June 18, 1913, were fixed in 1925, for its property used in transportation. The Michigan Central filed a protest, August 25, 1925, in which it claimed the cost of reproducing its properties used in transportation as of said valuation date, to be $399,344,283 (I. C. C. Rec., F. D. No. 5960, pp. 438, 450, 451); adding thereto investment to April 30, 1926, of $72,579,662 (see *Id.*, pp. 438-439), and excess of current assets over current liabilities on the same date, $23,260,669, and subtracting the equipment and mortgage indebtedness on the same date, $76,267,012, the total value of the stockholders' equity was then $418,917,602, which is, in relation to the capital stock of $18,736,400 (*Id.*, p. 418), equivalent to $2,235.85 per share of $100 par value. But in the present proceeding before the Commission the Michigan Central's claimed "Stockholders' Equity per share, Nov. 1, 1927," is valued in its behalf at $639.78 (R. 82). The New York Central's reports to the Commission disclose that in the two years ended December 31, 1931, it had purchased 275 shares of Michigan Central stock on an average price of $1,521.75—the last as high as $1,614.91.

(i) *Value of Big Four Stock, and Net Income Per Share.*—The Big Four claimed in the valuation proceedings before the Interstate Commerce Commission (Valuation Docket 264, p. 144) that the valuation of its property as of July 1, 1915, was $315,782,433 (I. C. C. Rec., F. D. No. 5960, Ex. 54, p. 632), and that additions and betterments made from July 1, 1915, to November 30, 1926, were $105,849,388. After adjustments relating to depreciation, cash and materials on hand, the valuation at November 30, 1926, was $408,719,773 (*Id.*, Ex. 55).

During the years 1927, 1928 and 1929, prior to the execution of the lease, further additions, betterments and investments in property were made to the extent of $27,299,350, and during the same period the indebtedness was increased approximately $12,606,800, as shown by the annual reports of the company for those years, or an increase in the value

of the property, above the indebtedness contracted therefor, of approximately $14,700,000, which inure to the benefit of the common stock, being about $31.26 per share.

The "fair return" fixed by the Commission, under the authority of Section 15a of the Interstate Commerce Act, is 5.75 per cent. (*Id.*, p. 396). Applying this rate to the valuation placed by the Big Four on its own property as of November 30, 1926, to wit, $408,719,773, the net income which the company was entitled to earn equalled $23,501,387, or $32.92 per share on the common stock.

As shown by the annual report of the company for the year ended December 31, 1926, the indebtedness of the company was $159,098,510, exclusive of current liabilities, which were offset by current assets. Deducting from the claimed valuation of $408,719,733, the indebtedness of $159,098,510, there remained an equity of $249,621,223 to represent the value of the outstanding $57,027,200 capital stock—preferred and common. Deducting from this equity of $249,621,223 the amount of $9,998,500 of 5 per cent. preferred stock at par, would leave $239,622,723 as the company's claimed value of 470,287 shares of common stock on November 30, 1926, or $509.95 per share, to which should be added the $31.26 per share for additions, betterments, etc., in 1927, 1928 and 1929, making $541.21. (In the present proceeding, however, before the Commission, the Big Four's claimed "Stockholders' Equity per share, Nov. 1, 1927," is reduced in its behalf to $201.75 for the common—R. 82.) The New York Central's reports to the Commission disclose that in the three years ended December 31, 1931, it had purchased 33,449 shares of Big Four common stock at an average price of $243.43—the last as high as $288.49.

The following statement shows the net income per share on common stock earned by the Big Four for the five years (1925-1929) next preceding the execution of the leases, after payment of all prior charges, including preferred stock dividends, and also shows the amount of dividends paid on the common stock:

Year	Per Cent. Earned on Common	Paid on Common
1925	25.22	$ 5.00
1926	23.07	7.00
1927	17.49	7.50
1928	17.58	8.00
1929	18.42	8.00
Total per cent. earned	101.78	$35.50
Average per year	20.35	7.10

The net income earned for the common stock for the year 1925 and dividend paid thereon are shown by one of the unnumbered exhibits annexed to the New York Central's application for authority to lease the Big Four and Michigan Central; and for the years 1926 to 1929, inclusive, are shown by the annual reports of the company for those years, offered in evidence (R. 165-185).

(j) *Testimony of Lessee's Officers as to Terms.*—Mr. A. H. Harris, vice-president and chairman of the Finance Committee, testified that he thought it no part of his obligation or duty in the quasi-fiduciary capacity of the New York Central, as the majority stockholder in this transaction, to make any inquiry in regard to what might be obtained for the leases of these properties at the hands of other possible lessees (R. 218). President Crowley testified likewise (R. 218-221). He admitted that possibly a much better bargain for the minority stockholders might have been obtained (R. 221). He admitted that for both leases the New York Central would not let this property go elsewhere at double the rental stipulated in these proposed leases (R. 219-220).

(k) *Lessee's Unauthorized Voting of Michigan Central Stock.*—On April 13, 1898, the New York Central & Hudson River Railroad Company, a corporate predecessor of the New York Central, executed a collateral trust indenture to the Guaranty Trust Company of New York, with the obligation of which the New York Central as successor in interest of the New York Central & Hudson River Railroad Company

is charged. By said indenture, all shares of the capital stock of the Michigan Central then owned or thereafter acquired by the New York Central & Hudson River Railroad Company were pledged to secure the payment of an authorized issue of 3½ per cent. gold bonds of the New York Central & Hudson River Railroad Company, payable February 1, 1998 (I. C. C. Rec., F. D. No. 5690, pp. 416-417, Ex. 47). Of these bonds, $19,336,000 are still outstanding (R. 18-20, 111-112).

By the terms of the indenture, it is provided in Sections 2 and 5 of Article Three as follows:

> "Section 2. But under no conditions shall either the Railroad Company or the Trustee, either by vote, or by abstaining from vote, or otherwise permit, but on the contrary, in every lawful way, by vote and otherwise, they shall oppose any increase of the capital stock of the Michigan [Central Railroad] Company, and (unless expressly authorized by the holders of 75% in amount of the bonds issued and outstanding under this indenture) any consolidation of the Michigan Company with any other railway or transportation company, either by purchase of stock or otherwise. * * *
>
> Section 5. The pledge hereunder of the said shares shall not prevent the consolidation or merger of the Michigan Company with, or the sale, conveyance or transfer of its property to the Railroad Company [meaning New York Central], upon such terms as shall be approved by the holders of 75% in amount of the bonds secured by this indenture; but, anything in this indenture contained to the contrary notwithstanding, in case of such express approval, but not otherwise, such consolidation, merger or sale may be made under any laws to which such companies then may be subject: Provided that in connection with such consolidation * * *. But no merger, consolidation or lease shall be made or permitted as in this section authorized, unless nor until the Railroad Company shall first," etc.

The pledged majority stock of the Michigan Central has been voted by the New York Central in favor of the proposed leases, without the authority or approval or any attempt to

obtain the assent of the holders of 75 per cent. in amount of the bonds issued and outstanding (I. C. C. Rec., F. D. No. 5690, pp. 656-657).

(l) *Compulsory Acquisition of Short Lines.*—Before the Commission, there were interventions on behalf of a number of so-called short lines, which urged that the leases should be authorized only on condition that provision be made for incorporating them in the unified system.

The New York Central originally opposed these short-line interventions on the ground that this proceeding related merely to the leasing of properties which were already a part of the New York Central System and did not involve the building up of an enlarged system; that therefore this was not a proper occasion for the consideration of the inclusion of any so-called short-line railroads; and that the Commission was not authorized to make another acquisition a condition of the making of the acquisition proposed (I. C. C. Rec., F. D. No. 5690, p. 168; see testimony of Harris, pp. 455-458).

The Commission, in its report of January 14, 1929, gave its authorization upon the express condition that before the leases should become effective, the New York Central should offer to acquire the lines of the Boyne City, Gaylord & Alpena Railroad, the Chicago, Attica & Southern Railroad, the Federal Valley Railroad, the steam railroads of the Fonda, Johnstown & Gloversville Railroad, part of the properties of the Owasco River Railway, and the lines of the Ulster & Delaware Railroad (*New York Central Unification*, 150 I. C. C. 278, R. 84).

As to Boyne City, Gaylord & Alpena Railroad, it appeared that the entire line was in poor condition (R. 56; I. C. C. Rec., F. D. No. 5690, pp. 1882-1889); that its rehabilitation and maintenance would impose a heavy burden (*Id.*, pp. 1889-1892); that its operating expense would be increased (*Id.*, pp. 1901-1902) and that its traffic is on the decline (*Id.*, p. 1909). With the exception of 1923, it has operated at a loss since 1922 (*Id.*, Ex. 117, No. 53; Exs. 250, 251, R. 55).

The Chicago, Attica & Southern Railroad would be of no value to the New York Central, as there are already in operation in its territory lines with more favorable grades and facilities (R. 59; I. C. C. Rec., F. D. No. 5690, p. 1289). It would have to be rebuilt before it could be operated by the New York Central (*Id.*, pp. 1289-1290). Rehabilitation will cost over a million dollars (*Id.*, p. 1283). Maintenance and operation would entail increased expense (*Id.*, p. 1291). The population in the territory it serves has decreased (*Id.*, Exs. 189, 190, 193) and is served by bus and trucking companies (*Id.*, p. 1302). From 1923 to 1926, inclusive, it has operated at a loss (*Id.*, Ex. 117, No. 35, p. 2; Exs. 96, 224).

The inclusion of the Federal Valley Railway would involve additional expense for rehabilitation and maintenance (*Id.*, Exs. 170, 171), and increased operating costs (*Id.*, p. 1219). Since January 1, 1921, it has operated at a loss (*Id.*, Ex. 117, No. 13; Ex. 76, R. 64).

The inclusion of the Fonda, Johnstown & Gloverville Railroad (subsequently eliminated by the Commission—R. 3) would have involved the cost of rehabilitation (R. 65; I. C. C. Rec., F. D. No. 5690, p. 1139), increased cost of operation (*Id.*, pp. 1143, 1144). Its territory is served by truckmen (*Id.*, pp. 1153, 1155). There has been a continuous falling off in passenger business since 1923 (*Id.*, p. 1186). Its net income has declined steadily since 1923 and during the first eleven months of 1927 a deficit was sustained (*Id.*, Ex. 117, No. 1, p. 2; Exs. 86, 217, 220).

The Owasco River Railway is engaged exclusively in switching service (*Id.*, pp. 1593, 1619). It has suffered deficits since 1923 (*Id.*, Ex. 117, No. 30, p. 2; Ex. 244, R. 68).

The passenger traffic of the Ulster & Delaware Railroad is rapidly decreasing due to the competition of motor busses and private automobiles (*Id.*, pp. 1017-1020, 1024, 1027). With the exception of 1923, there has been a continuous decline in total operating revenues since 1922, with deficits in 1925, 1926, and nine months of 1927 (*Id.*, Ex. 117, No. 47, p. 2; Exs. 62, 142, R. 71).

By the Commission's supplemental report of July 2, 1929 (*New York Central Unification*, 154 I. C. C. 489, R. 94), it

appeared that the New York Central had obtained an option to purchase all of the Owasco's capital stock for $75,000 in cash; that it had conducted negotiations with the five other short-line carriers, and, not reaching an agreement with any of them as to the commercial value of their various properties, had given all of them, except the Fonda, notice of its desire to arbitrate the matter of consideration; that it entered into arbitration agreements with the Federal Valley and the Alpena; that arbitrators between the New York Central and the Ulster had been chosen, as also between the New York Central and the Attica; and that it made to the Fonda a proposal to arbitrate. These steps the Commission found to be in *bona fide* compliance with the condition prescribed in their previous report, and accordingly they made the order of July 2, 1929 (R. 23), against which the original petition herein is directed.

It is further shown that subsequently the reports and orders of the Commission were amended by eliminating the Fonda; that it approved the acquisition by the New York Central of control of the Owasco by purchase of its capital stock for $75,000, which has since been effected (162 I. C. C. 200); that an agreement was reached, subject to the approval of the Commission, for the purchase by the New York Central of the entire capital stock of the Federal Valley for $150,000, the amount found by a majority of the arbitrators (162 I. C. C. 156); that in the case of the Ulster & Delaware, the arbitrators, by a majority report (two to one), determined the commercial value of its properties to be $4,100,000 and the Ulster & Delaware thereupon petitioned the Commission to direct the New York Central to take over its properties for that consideration, but said petition was denied; that the minority arbitrator fixed such value at $1,813,333 and the New York Central filed its application with the Commission to acquire the Ulster & Delaware for that sum, which application was at the time of the trial below still pending undetermined before the Commission; and that with respect to the Chicago, Attica & Southern, and the Boyne City, Gaylord & Alpena, the matters were then still pending undetermined by the arbitrators (cf. 167 I. C. C. 295).

Specification of Errors to Be Urged.

The District Court erred:

1. In holding that at the hearings held by the Interstate Commerce Commission upon the application of the New York Central Railroad Company (F. D. No. 5690), for authority to acquire control, under lease, of the railroad systems of the Cleveland, Cincinnati, Chicago & St. Louis Railway Company (Big Four), of the Michigan Central Railroad Company (Michigan Central) and of the Chicago, Kalamazoo & Saginaw Railway Company, the New York Central Railroad Company introduced material, relevant and competent evidence in proof of the fact that the acquisitions of control of the Big Four and Michigan Central under leases in the forms attached to said application, were in the "public interest" and for such considerations and on such terms and conditions as were just and reasonable in the premises.

2. In holding that the order of the Interstate Commerce Commission, dated July 2, 1929, in said case (F. D. No. 5690), authorizing and approving said acquisitions of control, and the findings contained in its reports of January 14, 1929, and of July 2, 1929, upon which the said order was based, were supported by competent and substantial evidence.

3. In holding that at the hearing held by the Commission upon the application of the New York Central Railroad Company, recorded under F. D. No. 7744, for authority to assume obligation or liability, in connection with said leases, in respect of the securities of the respective lessor companies, the New York Central Railroad Company introduced material, relevant and competent evidence in support of said application.

4. In holding that the order of December 2, 1929, of the Interstate Commerce Commission in said matter (F. D. No. 7744), authorizing the New York Central Railroad Company, as lessee, to assume obligation and liability, in respect of the securities of the lessor company, and the findings of the Commission in its report of even date, upon which the order was based, were supported by competent and substantial evidence.

5. In holding that the findings of the Interstate Commerce Commission upon the application of the New York Central Railroad Company (F. D. No. 5690) that for the acquisition of control of the Big Four and Michigan Central the considerations and terms and conditions set forth in the proposed leases were just and reasonable, were supported by competent and substantial evidence.

6. In holding that the orders, entered by the Interstate Commerce Commission, authorizing and approving the acquisition of control of the Big Four and Michigan Central, as prayed for in said application (F. D. No. 5690), were within the jurisdiction of the Commission and valid in all respects.

7. In holding that upon the findings by the Commission in the application recorded in F. D. No. 5690 and under the orders entered by the Commission upon such findings, authorizing and approving the leases of the Big Four and Michigan Central Railroads, the carriers affected by said orders were, pursuant to the provisions of paragraph 8 of Section 5 of the Interstate Commerce Act, relieved from the operation of the "anti-trust laws" and of all other restraints by law, State or Federal, in so far as may be necessary to enable said carriers to do anything authorized or required by said orders under and pursuant to paragraph 2 of Section 5 of said Act.

8. In holding that paragraph 2 and paragraph 8 of Section 5 of the Interstate Commerce Act are constitutional

and within the power of Congress to enact, and the powers therein conferred upon the Commission and herein exercised were lawfully conferred upon it.

9. In holding that the order entered by the Interstate Commerce Commission (F. D. 7744), authorizing and approving the assumption of obligation or liability by the New York Central Railroad Company, in respect of the securities of its lessor companies, was within the jurisdiction of the Commission and valid in all respects; and that the jurisdiction of the Commission, in respect of such assumption of obligation or liability, was exclusive and plenary.

10. In holding that the leasing by the New York Central Railroad Company of the railroad systems of the Big Four and of the Michigan Central, for the considerations and upon the terms and conditions set forth in the proposed leases thereof, was within the corporate powers of the lessor and lessee companies; and that such leases, upon the authorization and approval by the Commission, under paragraph 2 of Section 5 of the Interstate Commerce Act, are legal and valid.

11. In holding that the leases of the Big Four and Michigan Central having been found in the "public interest" and the considerations and terms and conditions of said leases having been found just and reasonable in the premises by the Commission, pursuant to the provisions of paragraph 2 of Section 5 of the Interstate Commerce Act, the same are not subject to attack in a suit brought by a minority stockholder of either the lessor or lessee companies, on the ground of an alleged conflict with the restrictions contained in Section 8809 of the General Code of Ohio, and/or with other limitations of said law alleged in the petition herein.

12. In holding that after control has been acquired through stock ownership and interlocking directorates, the

Commission has authority to approve leases on the basis of "public interest."

13. In holding that, in construing Section 5 (6) and Section 5 (2) of the Interstate Commerce Act, Congress laid down no test for consolidation other than ownership by one corporate entity.

14. In holding that the standard of judgment of what may be "in the public interest," provided by the Interstate Commerce Commission, was not too vague to be applicable and enforceable herein.

15. In holding that the dividend rentals were adequate and reasonable.

16. In holding that an inquiry by the Court below as to whether dividend rentals were adequate and reasonable, would involve a substitution of that Court's judgment for the judgment of the Interstate Commerce Commission.

17. In holding that the Commission did not abuse its discretion in authorizing the leases on the terms therein specified.

18. In holding that the finding of "public interest" was sufficiently supported by the evidence before the Commission.

19. In holding that the Commission had power to condition its authorization in F. D. No. 5690 upon the acquisition of the short lines for which the New York Central and Big Four had not applied and which they strenuously resisted.

20. In holding that the petitioner cannot assert the invalidity of such an order.

21. In holding that the Interstate Commerce Commission was empowered or entitled to disregard in the present case

prohibitions against the action taken herein existing under the laws of the State of Ohio and/or other States.

22. In holding that the danger of subsequent action by bondholders was too remote to constitute petitioner a party in interest under the trust agreement, entered into by the New York Central Railroad Company, pledging stock it owned in the Michigan Central.

23. In holding that the equitable right of the lessors' minority stockholders, including this petitioner, to require that the terms, conditions and considerations of these leases, if entered into at all, shall be nothing less than the best and most favorable in their behalf obtainable by the dominant party, was justly and reasonably subordinated and surrendered to the public interest by and in virtue of the Commission's permissive orders, thus depriving petitioner of its property without due process of law.

24. In holding that petitioner has shown no cause of action against defendants and is not entitled to any relief at law or in equity in the premises.

25. In holding that the petition filed herein should be dismissed upon the merits, with costs to the defendants.

26. In refusing to enjoin, set aside and annul, as prayed for herein, the orders of the Interstate Commerce Commission complained of, by holding as aforesaid in each and all of the foregoing assignments of error herein.

Appellant's Contentions.

By way of further specification of said errors here relied on, the petitioner contended below and contends here:

POINT I. The New York Central, having already acquired control of the Big Four and Michigan Central by stock ownership, the Commission had no power or jurisdiction to authorize the acquisition of control by lease (*cf.* Assignment of Errors, pars. 1, 2, 5, 6, 12).

POINT II. The acquisition here sought and allowed involves a consolidation beyond the power of the Commission to authorize under Section 5 (2) (*Id.*, 5, 6, 13).

POINT III. The Commission exceeded its lawfully delegated power in authorizing the New York Central Railroad Company to acquire control under lease of carriers whose main lines, together with sundry branches, are parallel and naturally competing with those of the lessee, so that competition between such lines will be suppressed and existing routes and channels of trade and commerce will be deflected; and it acted both arbitrarily and beyond its powers in finding such acquisition of control to be in the public interest (*Id.*, 5, 6, 7, 8, 14, 18).

POINT IV. As exertions of corporate power by the carriers concerned, the proposed leases are not within the sanction of the controlling statute of the State of Ohio; and as combinations of competing lines, they contravene constitutional or statutory limitations of corporate power to enter into such leases in every State they touch; so that on either ground the Commission was without power to approve and authorize them (*Id.*, 6, 7, 10, 11, 24, 25, 26).

POINT V. The lease of the Michigan Central was not duly authorized, having been voted by its majority stockholder contrary to the latter's express covenant with bondholders for whose security such stock is pledged, and also in breach

of said majority stockholder's fiduciary duty to the minority to keep and observe said covenant; and in these circumstances the Commission's refusal to pass upon said question, and its finding that acquisition of control through such lease will be in the public interest, were unreasonable, arbitrary, and unauthorized by Section 5 (2) (*Id.*, 17, 22).

POINT VI. The dividend-rentals stipulated in either lease are, as matter of law, inadequate and unreasonable; and the finding of the Commission, that the consideration, terms and conditions of the leases are just and reasonable, is unsupported by and contrary to the evidence and is an arbitrary and confiscatory act (*Id.*, 1, 2, 5, 6, 15, 16, 17, 23).

POINT VII. The Commission was without power to condition its authorization upon the acquisition of the burdensome short lines, for which the New York Central and Big Four had not applied, and to which they objected and protested; and the orders embodying and enforcing such condition are also arbitrary and confiscatory as to this appellant (*Id.*, 19, 22).

POINT VIII. The leases not being authorized by the Ohio statute, but being in violation thereof, the assumption of obligation and liability thereunder was not for a lawful object within the corporate purposes of the New York Central, and the Commission was without power to authorize such assumption (*Id.*, 3, 4, 9, 10, 11, 21).

CONCLUSION. Each of the orders under consideration should be set aside and the *status quo ante* restored (*Id.*, 1, 9, 15, 24, 26).

Jurisdiction of the District Court.

It having been moved in the District Court (R. 162, 163)—successfully as to some issues (R. 211-212)—that this suit be dismissed for want of jurisdiction under the rule of *Pittsburgh & W. Va. Ry. Co.* v. *United States*, 281 U. S. 479

(herein called the *Pittsburgh Case*), the following analysis is submitted to distinguish the two cases, and to show that the present suit—unique in one vital aspect—is governed rather by the *Chicago Junction Case,* 264 U. S. 258, that permits what in other circumstances the *Pittsburgh Case* forbids, namely, the joinder of grounds appropriate to a plenary suit with those peculiar to a suit brought under the Urgent Deficiencies Act (U. S. C., Tit. 28, Secs. 46, 47) to set aside an order of the Interstate Commerce Commission.

The *Pittsburgh Case* itself expressly distinguishes each of these others, declaring that (pp. 487-488), "Unlike orders entered in cases of reorganization and in some cases of acquisition of control of one carrier by another" (citing in the margin the instant case among others, viz., *N. Y. Central Unification,* 150 I. C. C. 278), "the order under attack does not deal with the interests of investors." Also, "The case at bar is wholly unlike *Chicago Junction Case* (*Baltimore & O. R. Co.* v. *United States*), 264 U. S. 258, 269, where a prayer to set aside the illegal purchase of stock and the lease already made, was held proper as ancillary to setting aside the order of the Commission authorizing the same. There, the joinder was permitted in order to carry out the purpose of Congress to make the judicial review effective."

The unique feature of the present case consists in the minority shareholders of the Michigan Central and the Big Four having not merely the usual interest of holders of securities of railroads that are being leased, but they are additionally and specially affected in that they have involuntarily become also, in fact and in law, actual parties of the third part (though of course not signatories) to the respective indentures of lease by which these properties are demised to the New York Central. This anomaly arises from the fact that the indentures themselves, as approved by the Commission, provide that the consideration, that is to say the rental-dividends, are to be paid by the lessee, not to the lessor companies, but directly to the lessors' stockholders; and the covenant for such payments thus enuring to them is so framed that, by adopting it, they could, in case

of default, maintain actions at law in their own names against the New York Central to recover the stipulated installments as they accrue.

Now Section 5 (2) of the Transportation Act (U. S. C., Tit. 49) gives the Commission power to "approve and authorize such acquisitions" by lease or otherwise (not involving the consolidation of such carriers) "for such consideration and on such terms and conditions as shall be found by the Commission to be just and reasonable in the premises." In making such finding of the justice and reasonableness of the consideration, terms and conditions of the acquisition of control by lease which it approved and authorized, the Commission's order not only operated straightway and of necessity upon petitioner's interest and right as a stockholder of the lessor companies, but it expressly found and determined, upon those statutory and jurisdictional issues, adversely to appellant's contention, urged both there and in this suit, which asserts that the considerations, terms and conditions stipulated in the indentures are neither just nor reasonable in the premises, but, conversely, as the bill here in substance charges and avers, are contrary to equity and good conscience, as well as to law.

The *Pittsburgh Case,* when before the Commission, was, as we have shown, a proceeding not under paragraph (2), Section 5 (as is the case in this as well as in the *Chicago Junction Case, supra*), but under paragraph (18), Section 1; and the statutory issues joined there were not whether the consideration, terms and conditions of the proposed transaction (as evidenced in the present case by the lease indentures exhibited by applicant to the Commission) were just and reasonable, but rather were whether or not the transaction there proposed was such that the present or future public convenience and necessity permitted the abandonment or required the extension of the parts of applicant's railroad which it specified. The justice and reasonableness, which the first cited provision of the act prescribes (but which the last cited provision does not include), apply not merely in reference to the public (for here the Commission

must already have found that the acquisition was "in the public interest"), but to the negotiating parties, and also to such others as are directly concerned or participating in the transaction. Thus not only will the setting aside of these leases, which have already been executed, be an item of relief strictly ancillary to and dependent on such judgment as this Court may render to annul the Commission's orders approving and authorizing the same (such relief being also both permissible and needful in order to make the mode of judicial review effective, as Congress intended it to be), but the principles of law and equity, which would warrant the former sort of relief in a plenary suit, are not different from a traverse of the statutory findings (viz., that the consideration, terms and conditions of the acquisition by lease of these carriers are just and reasonable), without which findings, properly supported and sustained by the record of the proceedings before the Commission, a judgment here to set aside its orders would necessarily follow. Of the grounds for relief that are hereinafter presented, not one involves any issue other than those challenging the constitutional or statutory power and jurisdiction of the Commission to make the orders complained of or alleging a mistake of law (which may involve the facts), or else charging such orders to be arbitrary, confiscatory, or unreasonable; that is to say, without due process, without evidence (or incompatible therewith), or conforming to the letter but not the spirit of the law. *I. C. C.* v. *U. P. R. R.*, 222 U. S. 541, 547. In no circumstances are these issues inadmissible in suits to set aside such orders of the Commission. But all of these grounds (including any that would be appropriate to a plenary suit) are alike within the scope of the statutory issues specially prescribed by Section 5 (2); for no terms and conditions nor any consideration, which is not lawful and equitable, can be "just and reasonable" in the premises.

As said by the Court in *Sprunt & Son* v. *United States*, 281 U. S. 249, 257, note: "In the *Chicago Junction Case*, the order violated the plaintiff's right under Par. 2 of Sec. 5 to equal treatment." But "equal treatment" is here men-

tioned only by implication and as involved in the statutory issues, equitable in their nature, which the section prescribes. Their scope, it is true, necessarily defines and limits the scope of this special form of court review. Unless such statutory issues before the Commission are broad enough to warrant, as in the *Chicago Junction Case,* not only the setting aside of the Commission's order, but also the like relief against the executed transaction which it had authorized, then indeed, as declared in the *Pittsburgh Case* (p. 488), "an application for such relief may not be included in a bill under the Urgent Deficiencies Act to set aside an order of the Interstate Commerce Commission." Otherwise, however, as the *Chicago Junction Case* asserts (pp. 269-270), "There is nothing in the legislation to indicate that Congress intended such a limitation of the scope of the relief to be afforded."

One thing further remains to be noted. The Commission's order of July 2, 1929 (R. 100), prescribed that the proposals for acquisition of control, "in accordance with the terms of the proposed leases set forth in the applications, and upon the conditions prescribed in said reports, be and the same are hereby approved and authorized." One of the said conditions provided, "That nothing herein shall be construed to relieve * * * the New York Central from compliance with provisions of law applicable to any assumption of obligations and liabilities, etc., by virtue of execution of proposed leases." This imposed condition had reference to the technical and statutory necessity for a distinct and separate application and proceeding before the Commission under paragraph (2), Section 20-a, which forbids any carrier "to assume any obligation or liability as * * * lessee * * * in respect to the securities of any other person natural or artificial * * * unless and until and then only to the extent that * * * the Commission by order authorizes such * * * assumption." And "The Commission shall make such order only if it finds that such * * * assumption: (a) is for some lawful object within its corporate purposes * * * and (b) is reasonably necessary and appropriate for such

purpose." Thus it came about that further statutory issues had to be determined by the Commission (besides finding the terms, conditions and consideration of these leases to be just and reasonable), viz., whether or not the New York Central's assumption of obligation or liability with respect to paying rental-dividends to the lessor companies' stockholders was for a "lawful object" within its corporate purposes, and whether or not the same was reasonably necessary and appropriate for such purpose. Such determination of the lawfulness and the reasonable necessity and appropriateness of the scheme or plan for and the rate of rental-dividends to be paid by the New York Central to the lessors' stockholders as the consideration for said leases, is of a character which directly affects this petitioner's interest as an investor by the proposal's rigid definition and limitation of the yield, as well as of the whole status, of the shares which petitioner owns in the lessor companies. And here again the definite statutory issues (lawfulness of the object, etc.) before the Commission embrace those herein urged that may be appropriate also to a plenary suit, as looking not only to the annulment of the Commission's approving order, but to the setting aside of the leases as well—such relief herein being properly dependent on and ancillary to any judgment to vacate said order and being likewise consonant with the purpose of Congress to make the judicial review effective.

From the foregoing considerations, we respectfully submit that the *Pittsburgh Case,* properly interpreted and applied, did not and does not warrant the dismissal of this bill or any part thereof for want of jurisdiction of the District Court, or for want of right in this petitioner to invoke its special jurisdiction, or for want of appropriateness of the grounds asserted and relief demanded for cognizance by the specially constituted tribunal.

POINT I.

The New York Central having already acquired control of the Big Four and Michigan Central by stock ownership, the Commission had no power or jurisdiction to authorize the acquisition of control by lease.

This Court will determine whether the Commission's orders exceed the power delegated by statute. *United States* v. *New River Co.*, 265 U. S. 533, 540; *I. C. C.* v. *Ill. C. R. Co.*, 215 U. S. 452, 470; *I. C. C.* v. *U. P. R. Co.*, 222 U. S. 541, 547. The Commission has power by its orders to approve and authorize the acquisition by one carrier of control over another carrier or carriers "either under a lease or by the purchase of stock or in any other manner not involving the consolidation," etc. U. S. C., Tit. 49, Sec. 5 (2).

By its orders here complained of, the Commission authorized the acquisition of control by lease, notwithstanding that the applicant through stock ownership had already acquired control of the same carriers (R. 11, 104, 105; and *cf.* 35, 40, and *Control of Big Four by New York Central*, 72 I. C. C. 96). So emphatic is the statute's disjunctive "either * * * or" as to admit grammatically of no other construction than that of the strict alternative; and the purpose of this paragraph—to provide only for dissoluble combinations—fortifies the syntax. The words of the act being plain and their meaning not doubtful, the Court is not at liberty to depart therefrom. *Matson Navigation Co.* v. *United States*, 284 U. S. 352, 356; *Corona Coal Co.* v. *United States*, 263 U. S. 537, 540; *People of the State of Michigan* v. *Michigan Trust Co.*, U. S. Sup. Ct. 76 L. Ed. (Adv. Op., 684-687); 52 Sup. Ct. Rep. 512-514; *Chicago, etc., Ry. Co.* v. *McCaull-Dinsmore Co.*, 253 U. S. 97, 99; *Old Colony R. Co.* v. *Commr.*, 284 U. S. 552, 560; *United States* v. *Scharton*, 52 Sup. Ct. Rep. 416, 417; *United States* v. *M. P. R. R. Co.*, 278 U. S. 269, 277-278; *Burnet* v. *Chicago Portrait Co.*, 76 L. Ed. (Adv. Op., 359-366).

To escape the express limitation of the power delegated by statute—though on the precise point the opinion seems confused (R. 189-190)—the District Court erroneously applied a canon of construction, departmental practice, which is admissible only to exemplify what is obscure, not to contradict what is express. *Logan* v. *Davis,* 233 U. S. 613, 627. Otherwise every administrative trespass would automatically supply its own further indulgence. The Commission seems never to have disclosed how, if at all, it rationalizes its sanctioning of a lease where the lessee by stock ownership already controls the lessor (R. 83), or to have defended its assumed right to approve repetitive acquisition of control by recourse successively to both branches of the "either * * * or" alternative in its exercise of the power delegated by Section 5 (2). (*Cf.* R. 40, lines 10-21; R. 43, last eight lines). And such construction is an obvious wresting of terms of plain import from their usual and well-understood significance. *United States* v. *First National Bank,* 234 U. S. 245, 259.

In this case the dissents within the Commission show that the practice is deemed to be still open to question by its own members (R. 85, 89, 92) and the same ought certainly to be true of those whose property rights its exercise now first invades. In every earlier case of this sort decided by the Commission, where the proposed lessee already had effective stock control of the lessor, there was apparently no stockholder aggrieved or else none left to object; hence this is the first instance of an unreconciled minority suing to annul an order for such cumulative control.

The minority right here asserted rests on a limitation of the Commission's power the meaning of which is thus so unequivocal and plain that Congress without redundance could not and cannot make it more express, nor departmental practice (except arbitrarily) make it less so. Such minority right is in this case insisted upon because independently of the leases the control previously acquired sufficed if properly utilized (R. 71, 72, 90) to realize the asserted benefits in respect to car mileage, car supply, op-

erating economies, interchange of facilities, and indeed all the indicated purposes except those here challenged and hereinafter discussed, namely, (a) of securing exemption from anti-trust laws (R. 72, 93), and (b) of excluding the minority stockholders in each of the large lessor companies from approximately half their proportionate share of the prospective fruits of its demonstrated net earning power (R. 16, 17, 110); and from any share at all in the predicted savings or augmented net earnings to accrue from the leases (R. 75).

POINT II.

The acquisition here sought and allowed involves a consolidation beyond the power of the Commission to authorize under Section 5 (2).

Effective stock control of the Michigan Central and the Big Four by the New York Central considerably antedates these leases (R. 39, 40), and it is admitted that the carriers which are parties thereto have long been operated in common control as a single co-ordinated system (R. 35, 48), and under the common designation, "The New York Central Lines," with substantially identical or closely interlocking boards of directors and certain common executive or administrative officers (R. 206); and it is also admitted that the leases contemplate complete unification of administration and operation of said properties by the New York Central Railroad Company (R. 104-105).

Reciting the "Reasons urged in support of proposals" for which the approving order herein was sought, the Commission at the outset observes, "The opinion was expressed in the testimony that the leases are steps leading in the direction of consolidation" (R. 47, 48). From applicant's testimony the Commission sees as the one "Purpose of proposals" so submitted for its approval that under stock control alone "the necessity of protecting earnings of each carrier prevents further unification and co-ordination. The purpose of

the proposed leases, it is stated, is to bring about handling of the properties by one strong operating unit" (R. 35). Without such tenure the routing of traffic, for example, "has been hampered by a proper regard for minority interests" (R. 48).

This obstacle is swept away by the leases, and the asserted economies—all previously available to the system and hitherto potentially beneficial to its units (R. 90)—are now to enure exclusively to the New York Central Railroad Company, as lessee, with its unrestricted possession and use of the combined properties as a single unit. The result of this latest step, the so-called acquisition of control by lease as authorized and approved by the orders of the Commission, is here challenged as being in fact and in law the consolidation of the carriers into a single system for ownership and operation (R. 10-12).

The Commission's action thus exceeds the power delegated by statute. In the proper exercise of that power it may by its order approve and authorize the acquisition by one carrier of control of another or others either under lease or by purchase of stock or in any other manner "not involving the consolidation of such carriers into a single system for ownership and operation." U. S. C., Tit. 49, Sec. 5 (2).

The intent of the limitation quoted was to deter the Commission from taking any action—under color of Section 5 (2), and in advance of the promulgating under Section 5 (5) of its nation-wide plan adopted and published since the orders herein complained of were made—which might forestall its exertion of the power conferred by Section 5 (6) to permit carriers "to consolidate their properties or any part thereof into one corporation for the ownership, management and operation of the properties theretofore in separate ownership, management and operation." (Note that if a consolidation be not involved in this proposed acquisition of control under lease, then these last seven quoted words will prevent such consolidation from being hereafter consummated.) Congress in this manner restricted the extent of advance control allowable by the Commission so that the

latter should keep both able and free to unscramble the elements involved in any acquisition of control and to reallocate the same in accordance with the complete plan. *Cf. Control of Big Four by New York Central,* 72 I. C. C. 96, 98, cited *supra;* also *Control of Cen. Pac. by So. Pac.,* 76 I. C. C. 508, 525, reserving right to terminate lease and stock control.

The District Court, however, sustained the orders as being consonant with its own interpretation of this limitation and also with its view of the previous construction thereof by the Commission (R. 190); thereby upholding defendants' contention that the language of the statute and the Commission's departmental practice rebut the proposition that "control by stock or lease or both may be of such degree as to amount to virtual consolidation and thus be beyond the Commission's power to authorize"; or, in other words, that there is any form of unification short of actual acquisition of the general title to properties which may not be carried out under Section 5 (2). But such generalization of an *ultra vires* practice thus attributed to the Commission would carry the asserted course of decision to an extreme that the majority of that body do not even now in terms acknowledge, nor have they officially avowed it by affirmative formulation to be found in the I. C. C. reports.

Undoubtedly the Commission, by allowing combined stock and lease control, had warped its jurisdiction in order to afford relief during and from its long delay in adopting its nation-wide plan of consolidation. But in the New York Central Unification the fusion of carriers is of such degree that no precedent quite so advanced in the departmental practice has been either cited or found (*cf.* R. 93). This more perfect union does not stop with almost identical directorates, common executives, centralized management, nearly 100 per cent. stock ownership, the vast network of intermingled traffic routes to be used interchangeably as a single system (R. 48), and the one corporation possessing and by various tenures owning all the properties concerned. There is not even reservation of right by the Commission to ter-

minate the stock or lease control, but a sealing of that door by elimination of separate operating accounts. Nor is this all. The dominion passed to the New York Central Railroad Company by the leases goes further yet.

Here it will be well to note in passing that the term "consolidation" as commonly employed in State constitutions and statutes does not necessarily import the acquiring of general title to constituent properties but embraces as well what the Commission styles a "unification." *East St. L. Connecting Ry. Co.* v. *Jarvis,* 92 Fed. 735; *Borg* v. *Illinois Terminal Co.,* 16 Fed. (2d) 988, 989; *People* v. *People's Gas Light Co.,* 205 Ill. 482, 492; 1 *Beach on Private Corporations,* Sec. 334. It is still more important to note that while "ownership" is not at common law a technical term but is as broadly inclusive as property and property rights (*B. & O. R. Co.* v. *Walker,* 45 Ohio St. 577; *Chotean* v. *Thompson,* 2 Ohio St. 114; *Fed. Trade Comm.* v. *Thatcher Mfg. Co.,* 5 Fed. [2d] 615, 620, 621), the word especially fits the purposes of Section 5 (2) and 5 (6), since degree of dominion rather than mere kind of title is the basis alike of what the one paragraph undertakes to forbid and the other to permit—inseparable unions of carriers. Under the latter paragraph no technical consolidation of the properties of two or more carriers pursuant to the permanent plan would ever be feasible if a strictly allodial or fee simple title is the only sort of ownership in the "one corporation" that can satisfy the statute.

Every railway system holds its various properties by many and diverse tenures, and, of course, absolute ownership is not ordinarily acquired by the proceeding in eminent domain to which railroads are so often compelled to resort for the acquisition of land. What then distinguishes a "unification" or lawful acquisition of control from a "consolidation" unless it be the avoidance by the former of such degree of dominion over the constituent properties as would make the union practically irrevocable? While absence of "ownership" is a part of the statutory criterion, clearly this is not limited to absolute title.

Consider for example a salient feature of the present case. A prime criterion of ownership is the possessor's right of spoil (*Bouvier's Dict.*), i. e., the right to consume, to destroy, or to dispose of property in possession, with or without having finally to account for it. Tested thus by the intent of the Transportation Act and by both the legal and the common acceptation of its words, this lessee's dominion, especially as enlarged by the leases in manner now to be shown, becomes—and its proprietary control of the New York Central Lines constitutes—the consolidation of such carriers into a single system for ownership no less than for operation, as contemplated by Section 5 (2) and (6).

In their main provisions the leases of the Michigan Central and of the Big Four are identical (R. 45), including those of the former about to be cited (R. 12, 45-47, 105-106). Article V, Section 3, provides that the lessee may, except to the extent of impairing the general integrity and continuity of lessor's transportation system, sell or otherwise dispose of lines of railway or tangible personal property not required in its judgment for proper operation and maintenance of the leased properties and expend the proceeds for additions or improvements thereon (R. 106). By Article IV, Section 1, lessee is to take over all cash of and collect all dues owing to lessor and sell all its Government bonds and notes, with like application of proceeds after discharge of lessor's liabilities. With the consent of lessor's board of directors, which is substantially identical with lessee's board (R. 105), other and essential lines or properties may be similarly disposed of (R. 106). Under Article VII (b), (c) and (d), the lessee with like consent may exercise the voting power on lessor's holdings of any subsidiary's securities for the like disposal of the latter's lines and property, or it may dispose of the securities and apply the proceeds as so consented to. By Article VIII, at expiry of the lease, return of rolling stock, equipment, etc., may be of equivalents in appraised value and general kind; and by Article IX, Section 7, the balance of account either way shall then be paid in money (R. 45).

Thus with the Commission's approval of the terms of each lease as authorized in advance by the stockholders and the directors and executed accordingly by its officers, the lessor thereby surrenders presently to the lessee its dominion over the leased property upon the latter's promise to account at termination for the same or its equivalent in kind or money, with only the stipulation that as to essential parts disposal and application of proceeds shall be by leave of lessor's board —a formality always and exclusively within lessee's power at pleasure to discharge without further order by the Commission or further approval by lessor's stockholders. Congress' aim was not so. When a lessee owns a lessor's capital stock, the reversion has been aptly called an "empty shell." By these indentures the lessee is in addition empowered to commute the shell.

In the present case as thus discriminated, departmental practice should not be held to validate a usurpation that outstrips any clear precedent the Commission had theretofore established; else progressive administrative encroachment could never be judicially curbed. Of its previous decisions approving unifications under Section 5 (2)—decisions which fall short of this latest mark though claimed by appellees to embrace it in principle—the circumstance that not one has been judicially tested cannot warrant the inference of final acquiescence in such supposed trend and asserted goal of administrative practice so long as there lacked a substantial invasion of minority right or other sufficient occasion for seeking a court review.

The Commission, moreover, has vacillated in its allowance or denial of proposed expansions and combinations of railroad properties under Sections 1 (18) and 5 (2) (see *Consolidation of D. T. & I. and D. I. R. R.*, 124 I. C. C. 145, 159; and *cf. Acquisition and Stock Issue by N. Y., C. & St. L. R. R. Co.*, 79 I. C. C. 581), and has itself intimated that its own decisions under divers provisions of the Transportation Act are not to be deemed binding upon it (*Securities of La. Ry. & Nav. Co.*, 99 I. C. C. 357); whence it follows that for an accepted or uniform interpretation of the act neither

the courts nor the public can implicitly rely on any supposed norm of departmental practice. *Chicago, etc., Ry. Co.* v. *McCaull-Dinsmore Co.*, 253 U. S. 97, 99, 100.

No serious inconvenience need be apprehended from a refusal of the courts to follow a dubious practice to the extreme limit to which it was here unwarrantably carried; for in previous cases of this sort, wherever corporate action was taken pursuant to the governing State statutes by the parties to a proposed unification, if in any instance the Commission's approval thereof in advance of the final adoption of its plan should hereafter be held to have overstepped the limitations of its power under Section 5 (2), such union, being at the time still within the competency of the States (*Snyder* v. *N. Y., Chicago & St. L. R. Co.*, 276 U. S. 578, aff'g 118 Ohio St. 72), might be upheld despite the vain looking to said Section 5 (2) by both the Commission and the applicant; inasmuch as the attendant revision of financial structure would have been independently sanctioned under Section 20-a. But if the final step in any such ultra-unification of carriers were found incompatible with both State and Federal laws, such carriers would of course be relegated to their former status. And now that the Commission's general plan of consolidations has been adopted, there should be an end of attempts to use Section 5 (2) or Section 1 (18) as a shunpike.

It is confidently submitted that by both the plain purpose and the very letter of this enactment when applied to the unique situation presented by these leases—pursuant to the terms of which it is within the power of lessee during the term to convert every part of the property demised and be finally holden only for the price obtained for it—and when taken together with all the above-discussed features attending the transaction as approved by the Commission's orders, this "unification" of carriers must be distinguished and condemned as an acquisition of control which is not only without any properly governing precedent but, for this once at least, overleaps the expressed limitation of the power delegated by Section 5 (2) because of "involving the consolidation of such carriers into a single system for ownership and operation."

POINT III.

The Commission exceeded its lawfully delegated power in authorizing the New York Central Railroad Company to acquire control under lease of carriers whose main lines, together with sundry branches, are parallel and naturally competing with those of the lessee, so that competition between such lines will be suppressed and existing routes and channels of trade and commerce will be deflected; and it acted both arbitrarily and beyond its powers in finding such acquisition of control to be in the public interest.

Jurisdiction of the Commission to make an approving order under Section 5 (2) hinges upon its finding first that the proposed acquisition of control will be "in the public interest." *Wichita R. R. & Light Co.* v. *Pub. Util. Comm.*, 260 U. S. 48, 58; *Beaumont, Sour Lake & W. Co.* v. *United States*, 282 U. S. 74, 86. The act itself, however, prescribes no definite standard nor any intelligible principle to which the Commission is directed to conform; and the report cites none (R. 83-84, 47-51, 90; and *cf.* especially *Clinchfield Ry. Lease*, 90 I. C. C. 113, 121). To leave this essentially legislative concept to the determination and discretion of the Commission is an unconstitutional delegation by Congress of its legislative power. *Hampton, Jr. & Co.* v. *United States*, 276 U. S. 394, 409. The assumed power and authority to make these orders being thus without a valid footing (*U. S. Const.*, Art. I, Sec. 1), the orders themselves will be held void.

Although the act leaves indeterminate what may be deemed to be "in the public interest" under Section 5 (2), those features must certainly be deemed to be against public interest which Congress by Section 5 (4) has prohibited in railroad consolidations, viz., every unnecessary suppression of competition and every avoidable diversion of existing traffic routes. But the things which the statute thus brands as

against the public interest are precisely the ends which in the same asserted interest this acquisition of control purports to achieve (R. 48, 49, 89-90, 93). Under color of the power and duty to determine whether or not this proposal is in the public interest, the Commission's affirmative finding (R. 83-84) as particularized in its report (R. 35-39, 48-49) runs squarely counter to the most obvious test the act affords. And this, too, requires the setting aside of these orders.

It will of course be noted that the above-cited provision of Section 5 (4) stands in apparent opposition to that of paragraph (8) which relieves the carriers affected by orders under earlier provisions of the section "from the operation of the 'anti-trust laws.'" In the face of this dilemma which looks to both the preserving and the relinquishing of competition, the only escape from repugnancy fatal to the whole section (*Rice.* v. *Minn. & N. W. R. Co.*, 66 U. S. 358, 378-379) lies in so restricting the scope of the latter paragraph that if any valid order of the Commission under a preceding provision of Section 5 interrupts competition in minor particulars that cannot be obviated—which is the most that any such order can lawfully do in view of the limitation in paragraph (4)—then paragraph (8) will operate to relieve the carriers concerned from the resulting incidental or technical breaches of the anti-trust laws.

Accruing thus automatically, such immunity may be conceived to proceed directly from the will of Congress. But without such restriction of the scope of paragraph (8), it must proceed from the Commission's discretion—under an inadmissible, as well as a repugnant, delegation by Congress of its legislative power—to be exercised in the weighing of whatsoever the former may deem pertinent to the public interest over against such specification thereof as Congress has embodied in the anti-trust laws. In the nature of things probably no plan "for the consolidation of the railway properties of the continental United States into a limited number of systems" could, without some such breaches at once preserve competition and also meet every other requirement of Section 5(4). But in testing the lawfulness of this proceed-

ing under Section 5(2), which was decided by the Commission before it had adopted its nation-wide plan, it cannot be overlooked that there is nothing inherent in the nature of an isolated and lawful acquisition of control to preclude the preservation of competition and of existing traffic routes, save in occasional and negligible details.

Thus in the situation here presented, paragraph (8) could not empower the Commission—or remove the prohibitive limitation imposed by paragraph (4) in restraint of its power—to make the favorable finding and orders in the present case, where the competitive relationship between lessors' and lessee's trunk lines, together with that of numerous interconnecting branches, stands out as the main inducement of the proposed acquisition of control and the principal ground of its accepted claim to be "in the public interest" as affording advantageous choices of alternative routes (R. 48-49), though this very feature contravenes that canon of the public interest afforded by the requirement of paragraph (4) that "competition shall be preserved as fully as possible, and wherever practicable the existing routes and channels of trade and commerce shall be maintained." *Chesapeake & O. R. Co.* v. *United States,* 283 U. S. 35, 45.

The District Court uncritically disposed of this whole subject by observing (R. 191) that "the Commission merely determines applications for acquisition of control under Section 5 (2) in the light of the public interest, and Congress thereupon attaches the exemption of the statute expressed in Section 5(8)"; and by further pointing out (R. 192) as against the asserted vagueness of the expression "in the public interest," that "standards no more precise than that films be found 'moral, educational, or amusing and harmless' "; or "that imported teas be pure"; or "requiring a finding of foreign discrimination"; or "that an alien is an 'undesirable resident' " have "all been sustained as against a similar contention of invalidity."

But except in the last instance—where the Court found that a separate statutory standard existed and was applicable—not one of these examples affords an adequate parallel.

In all of them the challenged words have a well-understood meaning and an ascertainable scope according to prevailing standards. This is not true of the "public interest," any more than of, *e. g.*, the general welfare. Only Congress itself can tell what it intended that phrase to signify or to include. Thus if it is in the public interest to preserve competition as far as possible, then it is not in the public interest to do away with that obstacle to monopolistic unifications of carriers by orders that must look to the suspending of the anti-trust laws to give them validity. In such case it is not Congress but the Commission that repeals *pro tanto* a penal statute.

Because the Commission was not qualified, for lack of a sufficient legislative or generally understood standard, to make the jurisdictional finding of public interest on which its orders herein are based; and also because in making such finding and orders it exceeded its constitutional and statutory power as limited not only by anti-trust laws but by the requirement of Section 5 (4) of the Transportation Act for the preservation of competition and existing traffic routes; and as further restricted by Article I, Section 1 of the Constitution, defining the seat of legislative power—for each and all of these reasons the said orders, it is submitted, must be set aside.

POINT IV.

As exertions of corporate power by the carriers concerned, the proposed leases are not within the sanction of the controlling statute of the State of Ohio; and as combinations of competing lines, they contravene constitutional or statutory limitations of corporate power to enter into such leases in every State they touch; so that on either ground the Commission was without power to approve and authorize them.

A common carrier by railroad cannot lease its line to another without a statutory grant of power to do so; nor can a carrier take such lease from another carrier without

being so empowered. *Thomas* v. *W. Jersey R. Co.*, 101 U. S. 71; *Pa. R. R.* v. *St. L., Alton & Terre Haute R. R.*, 118 U. S. 290, 309; *Oregon Ry.* v. *Oregonian Ry.*, 130 U. S. 1; *St. L., Vandalia & Terre Haute R. Co.* v. *Terre Haute & Ind. R.*, 145 U. S. 393.

Although the carriers that are parties to these leases are engaged in large part in interstate commerce, yet as corporations they are creatures of the States, so that the sources of the grants and limitations of their corporate powers (*e. g.*, to lease, or purchase, or consolidate with, others' lines) lie in the constitutions and statutes of the States in which they are chartered or operated (*Louisville & N. R. Co.* v. *Ky.*, 161 U. S. 677, 702-703) save when such laws are superseded under the commerce power of Congress by a Federal statute exclusively occupying the same field; *i. e.*, covering the same subject in such measure as to exclude action by the State which otherwise would be clearly within the latter's province. *Simpson* v. *Sheppard* (*Minn. Rate Case*), 230 U. S. 352, 417.

As such power then "is derivable from the State, the State may accompany it with such limitations as it may choose to impose" (*L. & N. R. Co.* v. *Ky., supra,* at p. 703), and "it has also been held that the state has the power to forbid the consolidation of state railroad corporations with competing lines, although both may be interstate carriers, and the prohibition may have a far-reaching effect on interstate commerce." *Minn. Rate Case, supra,* at p. 410.

The Ohio Incorporated Companies Act of 1852, as amended in 1873 by 70 Ohio Laws 129, Section 24 of the division entitled "To create and regulate railroad companies," contained the following grant and limitations of power, namely, that "any railroad company organized in pursuance of law may lease or purchase any part or all of any railroad constructed by any other company, if said companies' lines of said road are continuous or connected, and not competing, as aforesaid, upon such terms and conditions as may be agreed upon between said companies respectively, or any two or more railroad companies whose lines are so connected, and not competing, may enter into any arrangement

for their common benefit, consistent with and calculated to promote the objects for which they were created; provided, that no such aid shall be furnished, nor any purchase, lease or arrangement perfected until a meeting of the stockholders of each of said companies shall have been called for that purpose by the directors thereof, on thirty days' notice to each stockholder, at such time and place and in such manner as is provided for the annual meetings of said companies, and the holders of at least two-thirds of the stock of each company, in person or by proxy, shall have at said meeting assented thereto; and provided, that in case of the lease of any railroad situate in whole or in part within this state, the rental reserved and secured for said leased road shall be equal at least to the net earnings of such leased road for the fiscal year next preceding the one in which said lease is made."

On the provisions above quoted from the single sentence in which they were originally embodied nearly sixty years ago the power of railroads to enter into leases of lines lying wholly or partly in Ohio has ever since depended. To-day in practically identical language, the same statute, having meanwhile passed through two codifications (Revised Statutes of 1880, Sections 3300 and 3301; General Code of 1910, Sections 8806 and 8809 inclusive) remains in force in its entirety as separately numbered sections of the present General Code. The limitations in regard to competing lines and minimum rental are now contained in Sections 8807 and 8809 (see Appendix, p. [i]) and their being thus split up is held to work no change whatsoever in the meaning or application of the original statute. *Cf. State, ex rel., etc.* v. *Bushnell, et al., etc.*, 95 Ohio State 203, syl. 2; *Buck Stove & Range Co.* v. *Vickers*, 226 U. S. 205, 213; *United States* v. *Ryan*, 284 U. S. 167, 174-175; *McDonald* v. *Hovey*, 110 U. S. 619, 629; *Anderson* v. *Pacific S. S. Co.*, 225 U. S. 187, 213; *United States* v. *Sischo*, 262 U. S. 165, 168-169.

And the courts have construed this statute as it was dissected in the first codification (Rev. Stats., Secs. 3300, 3301) to embody not only the grant but also the inseparable

limitations of the corporate power of railroad companies to enter into leases or other agreements between themselves in respect to their lines of road. *Mannington* v. *Hocking Valley Ry. Co.*, 183 Fed. 133, 150-151; *Central Trust Co.* v. *Wheeling & Lake Erie R. R. Co.*, 211 Fed. 515, 525-526, and cases cited; *State ex rel. Atty. Gen.* v. *Cleve. & Pitts. R. R. Co.*, 13 Ohio C. C. (N. S.) 145; *State* v. *Vanderbilt*, 37 Ohio St. 590, 640, and *cf. Bank of the U. S.* v. *Dandridge*, 25 U. S. 64.

In 1883 (80 Ohio Laws 116; Rev. Stats. of 1880, Sec. 3305; now Gen. Code, Sec. 8813) the further limitation was added that no such lease shall be made "unless the lessor receives full and adequate security for the payment of the rental and for the preservation of the property in as good condition as on entering into possession thereof."

Combinations between competing lines, whether effected by lease or otherwise, are further prohibited by express constitutional or statutory provisions in every State in which the lines of one or both lessors herein are parallel or competing with those of the lessee or of each other. Gen. Code of Ohio, Sec. 9027; Mich. Const., Art. XII, Sec. 8; Mich. Compiled Laws, Chap. 159, pars. 8263, 8435; Sec. 1; Ind. Acts of 1913, p. 462; Ill. Const., Art. XI, Sec. 11; Ill. Stats., Chap. 114, par. 36; *cf. E. St. L. Connecting Ry.* v. *Jarvis*, 92 Fed. 735; cited in *Borg* v. *Ill. Term. Co.*, 16 Fed. (2d) 988, 989 (*supra*), and *People* v. *People's Gas Light Co.*, 205 Ill. 482, 492 (cited *supra*). The word "purchase" in these provisions of the Illinois Constitution and laws includes every mode of acquiring title other than by descent. *Chicago & E. I. R. Co.* v. *Doyle*, 256 Ill. 514.

Some of these provisions are immediately associated with grants of corporate power to enter into railroad leases and other inter-corporate relations; but no regulation of the whole subject is anywhere more explicit concerning the leasing of competing carriers, or the protection of minority interests against inadequate rentals and the exploiting of leased roads, or more careful to affix these safeguards to the grants of corporate power as limitations thereon, than

that of the Ohio statutes above cited. Thus of the effect of Section 22 of the original Ohio Incorporated Companies Act on the right of consolidation—and the same under Section 24 is true of leases—by interstate carriers of their lines in that State, this Court has reiterated that the "power of corporations of other states to become corporations, or to constitute themselves a consolidated corporation under the Ohio statutes and thus avail of the rights given thereby, is as completely dependent on the will of that state as is the power of its individual citizens to become a corporate body, or the power of corporations of its own creation to consolidate under its laws." *Kansas City, M. & B. R. Co.* v. *Stiles,* 242 U. S. 111, 117, quoting from *Ashley* v. *Ryan,* 153 U. S. 436, 442.

However else the Transportation Law may have qualified the corporate capacity or the States' jurisdiction of such carriers, and whether or not Section 5 (2) makes their resort to the Commission mandatory for its approval of any proposed acquisition of control by lease, they still derive from the States their corporate power, and the mode prescribed for exercising it, to enter into leases; and in Ohio the above-quoted limitations of such power are inseparable from the grant. Section 5 (2) prescribes no internal corporate proceedings for the making of such demise, but leaves the carriers in this respect where it finds them, namely, subject to the corporation codes of the States where they are chartered or do business. The provisions, for example, of the Ohio statute requiring thirty days' notice of the several corporate meetings and a two-thirds' vote of the stock of each company had to be and were duly observed in this case.

The orders herein complained of contravene the Ohio statute—and under the first of the following specifications the cited laws of other States as well—in approving and authorizing the New York Central's acquisition of control, *ultra vires,* (a) by leases of competing lines, (b) for a rental less in each case than the net earnings of the leased road for the fiscal year next preceding, and (c) without security for payment of the rental and preservation of the property.

In these particulars Section 5 of the Transportation Law does not allow relief to carriers from the original and inherent limitations of their corporate powers in the premises nor purport independently to grant such powers or to define any mode of exercising them.

Section 5 (2) provides that "the Commission shall have authority by order to approve and authorize such acquisition, under such rules and regulations and for such consideration and on such terms and conditions as shall be found just and reasonable"; and by Section 5 (8) that the "carriers affected by any order made under the foregoing provisions of this section and any corporation organized to effect a consolidation approved and authorized in such order are relieved from the operation of the 'anti-trust laws,' as designated in section 12 of Title 15, Commerce and Trade, and of all other restraints or prohibitions by law, State or Federal, in so far as may be necessary to enable them to do anything authorized or required by any order made under and pursuant to the foregoing provisions of this section."

These provisions carry, not a grant of corporate power, but a dispensation from "restraints and prohibitions." The Ohio statute here considered is not a restraint or prohibition. But for it the railroads would be powerless to make any lease. The Ohio statute is an enabling, not a restraining, act. It authorizes only such a lease as provides at least the minimum rental prescribed, and also adequate security for the payment of the rental and the preservation of the leased property. And the expression, "all other restraints or prohibitions by law," construed in its relation to the context under the *ejusdem generis* rule, signifies restraints and prohibitions of the same general character as the anti-trust laws. See *Alabama* v. *Montague,* 117 U. S. 602, 610. Had Congress meant more than this, it knew well how to say so; *e. g.,* in the concluding clause of paragraph (6) of this same section.

If the requirement of the Ohio statute as to rental were a "restraint or prohibition" against which the order of the Commission conferred relief, then so also would be the pro-

vision of the same section (Gen. Code, Sec. 8809) requiring the consent of two-thirds of the stockholders; though the latter is conceded on all hands to be a prerequisite to any valid lease, and its observance, being deemed necessary in this transaction, was not omitted. The Commission's report declares that (R. 155; *cf.* 76, 152-154), "Whether or not the New York Central, the Michigan Central and the Big Four have corporate capacity under the Ohio statutes to execute the proposed leases is dependent upon construction of those statutes. Pending such construction by a court of competent authority, we feel that we may accept the opinion of applicant's counsel."

The District Court held that (R. 197), "Though in the original statute (70 Ohio Laws 129, Section 24) the restraint was in the form of a proviso on the power to lease, the code now in force deals with the minimum rental in a separate section"; and concluded (R. 198), "We consider the corporate power unaffected by the limitation thereon." This view, as we have seen, is clearly unsound. But the Court also said that under Section 5 (2) "the attack based upon the state law limitations of the corporate power has no place in the suit to annul the order." This, too, is a misconception. See "Jurisdiction of the District Court," *supra*, p. 23. It need only be added that in *Cleveland, C., C. & St. L. Ry. Co.* v. *Jackson*, 22 Fed. (2d) 509, 511 (cited *supra*), the Sixth Circuit C. C. A. held that, in this case then pending before the Commission, that body had power and was required to consider the rights of minority stockholders, including those based on State statutes, and that its determination is subject to judicial review by suit like this to set aside its orders prejudicial to those interests.

So also a plenary suit brought by a minority stockholder in a State court and removed by defendant to the District Court, wherein it was sought to enjoin a carrier from unlawfully lending its credit to other carriers by means of a joint and several equipment trust entered into in 1922 by the same railroads that are defendants here, such transaction being charged to be contrary to State laws and incapable of valida-

tion by Transportation Law, Section 20-a, was there dismissed for want of jurisdiction because it was not brought under the Urgent Deficiencies Act and was in legal effect an action to enjoin the enforcement of an order of the Commission. And this Court affirmed the dismissal. *Venner* v. *Mich. Cen. R. R. Co.*, 271 U. S. 127; *cf. So. Pac. Co.* v. *City of Willow Glen*, 49 Fed. (2d) 1005, 1008.

The conclusion is inevitable that in a minority stockholders' suit begun in the District Court under the Urgent Deficiencies Act to set aside an order of the Commission under Section 5 (2) upon the ground that such order denies him equal treatment or will unlawfully injure his pecuniary interest as an investor, the plaintiff may litigate every question pertinent to such claim as in a plenary suit in equity; for otherwise he would no longer have a remedy to prevent threatened damage to himself from unconscionable or *ultra vires* acts by his own corporation in the carrying out of permissive orders of the Commission; or else such orders would be subject to defeat in suits for injunction to which the Commission is not made a party.

POINT V.

The lease of the Michigan Central was not duly authorized, having been voted by its majority stockholder contrary to the latter's express covenant with bondholders for whose security such stock is pledged, and also in breach of said majority stockholder's fiduciary duty to the minority to keep and observe said covenant; and in these circumstances the Commission's refusal to pass upon said question, and its finding that acquisition of control through such lease will be in the public interest, were unreasonable, arbitrary and unauthorized by Section 5 (2).

The "Three and One-half Per Cent. New York Central-Michigan Central Collateral Trust Indenture" (I. C. C. Rec., F. D. No. 5690, Ex. 47), under which all of the Michigan

Central majority stock is pledged to secure the bonds covered thereby, provides in Article 3, Section 2, that unless expressly authorized by the holders of 75 per cent. in amount of such bonds, neither the railroad nor the trustee shall vote for, but on the contrary shall oppose "any consolidation of the Michigan Company with any other railway or transportation company"; but the pledge shall not prevent (Sec. 5) "the consolidation or merger of the Michigan Company with, or the sale, conveyance or transfer of its property to the Railroad Company" (now the New York Central) "upon such terms as shall be approved by the holders of seventy-five per cent." as aforesaid; and again, "But no merger, consolidation or lease shall be made or permitted as in this section authorized, unless and until the Railroad Company shall first * * *."

That the term "consolidation" in the former section is used in a comprehensive sense is indicated by the qualifying words, "either by purchase of stock or otherwise"; and the latter section in the same connection further particularizes it by using the terms "consolidation," "merger," "sale, conveyance or transfer," and "lease."

These provisions were intended to secure the bondholders against any such change in the ownership or operation of the Michigan Central as this acquisition of control by lease involves, unless the change should so commend itself as to receive the prescribed 75 per cent. consent. No attempt was made to obtain such consent, but the majority stock of the Michigan Central was voted for the lease, and the acquisition of control by lease has been accomplished in total disregard of said covenant (R. 18-20, 27, 82, 111-112, 119-200).

The bondholders could, of course, successfully contest the lease; and, should interest prompt them, they may be expected to do so. In such case the Michigan Central minority stockholders must suffer from a belated and forcible disruption of the unified properties after their own company's separate identity, organization and good will shall have been lost by disuse and lapse of time. So the majority stockholder's voting of the lease violated also its fiduciary duty

to the minority—a breach then enjoinable at their suit were the matter not one within the Commisison's purview. *Cf. Cleve., C. C. & St. L. Ry. Co.* v. *Jackson,* 22 Fed. (2d) 509; *Venner* v. *Mich. Cen. R. R., supra.* The consideration of the public interest, enjoined upon the Commission by Section 5 (2), requires that the interests of the stockholders be considered and protected; and the hazard of loss to them from thus exposing the lease to attack should have stayed its hand or have caused it to condition its order of approval upon the procuring of the required consent. The New York Central as applicant before that body should have approached it with clean hands. The approval and authorization there sought need not have been granted inasmuch as there was nothing therein from the standpoint of the public to demand the making of the lease. No matter how slight or remote this danger might appear to the Commission no urgency of public interest was present to hinder it from requiring the applicant to correct this defect in its proposal. The Commission, however, held upon this point that (R. 82), "The question presented is one which we cannot undertake to decide." The District Court erroneously held that (R. 200), "plaintiff is not a party in interest under the agreement," and that "The danger of subsequent action by the bondholders is too remote." But without the requisite consent of bondholders and for want of any conditioning provision therefor either in the Michigan Central lease or in the Commission's order approving the same, such order and the jurisdictional findings in support thereof are arbitrary, unreasonable and a misapplication of Section 5 (2).

POINT VI.

The dividend-rentals stipulated in either lease are, as matter of law, inadequate and unreasonable; and the finding of the Commission, that the consideration, terms and conditions of the leases are just and reasonable, is unsupported by and contrary to the evidence and is an arbitrary and confiscatory act.

The dividend-rental of $50 per share per annum on the Michigan Central stock is almost exactly one-half its average annual net income for the five years 1925 to 1929, inclusive. It is less than 2¼ per cent. of the fair valuation of that company's properties according to its own showing in valuation proceeding before the Commission. The dividend-rental of $10 per share per annum on the common stock of the Big Four is less than half its average annual net income for the same years; and it is less than 2 per cent. of the fair valuation of its properties as similarly shown.

For this the New York Central receives all of the net earnings of the two roads during the ninety-nine-year term of the leases. The lessees get nothing more, either in money or in property; any betterments are at the expense of the respective lessors. The possibility of any surplus accumulating during that period is absolutely barred. No undivided earnings will be plowed in for the reaping of a subsequent harvest by the stockholders. The lessee also gets the use of all the cash and current assets of the lessors, without interest; this includes the surplus of the Michigan Central of about one hundred and one-half millions, over five times the amount of its capital stock. In addition, the lessee will get the savings which it expects to realize through the economies to be effected as a result of the acquisition.

The New York Central as majority stockholder gains in the one capacity what it loses in the other. Not so of the lessors' minority stockholders. What they lose the lessee gains. When the New York Central leased the Boston &

Albany the rental fixed was substantially equal to the entire net income of the lessor. The lease was made in 1900, at a rental of 8 per cent. upon the stock of the lessor. The earnings of the lessor upon its common stock, prior to the lease, had been (I. C. C. Rec., F. D. No. 5690; Harris, pp. 404-406): 1900, 8.07 per cent.; 1899, 8.12 per cent.; 1898, 8.12 per cent.; 1897, 8.16 per cent.; 1896, 8.07 per cent.; 1894, 8.03 per cent.; 1893, 8.12 per cent.; 1892, 8.03 per cent.

The cross-examination of President Patrick E. Crowley by Mr. Elihu Root, Jr., as counsel for the Big Four stockholders' committee, and of the same witness and also of Vice-President A. H. Harris, chairman of the New York Central's finance committee, on behalf of the Michigan Central's stockholders, is brief and illuminating and should be read by this Court (R. 218-221). It discloses that other railroads might have offered better terms and that the New York Central would not have accepted twice the stipulated rental and let the leases go elsewhere. It shows also that the leased properties had a peculiar value to the lessee, but that these officers thought it no part of their duty in the fiduciary relation of the New York Central as majority stockholder to make any inquiry for better terms or to make as good a bargain for the minority stockholders as they would have insisted upon for the dominant party in like circumstances.

The Court is urged to bear in mind that this transaction is entirely a voluntary proposal by the New York Central. Of course, the public interest does not require that these properties be leased at all. Neither Congress nor the Commission has commanded it. The New York Central was under no compulsion of law or equity to enter into the leases. As a fiduciary, the lessee was not even permitted, on familiar principles of law and equity, to enter into the leases at all except upon the very best terms obtainable from any other lessee, nor for any less than the utmost it would itself be willing to pay rather than that another should become the lessee.

Perhaps (though it is not admitted) such terms would exceed what the public interest would permit. If so, the leases could not be voluntarily consummated. Both conditions must be satisfied, so long as such transactions are on a voluntary basis and are not compelled by statute, with a scrupulous discharge of the fiduciary duty as well as a scrupulous preservation of the public interest. Not only must the terms and conditions lawfully prescribed by the Commission in behalf of the public be observed, but also the rights in law and equity of the *cestui que trust.* No doubt the public interest is relatively the more important; but it can never be made exclusive. At any rate, it need not now be inquired whether Congress could make the public interest the sole criterion, if compulsory acquisition of control by lease were made the subject of Federal legislation. The order authorizing and approving these leases does not necessitate their being entered into.

On the issue of "public interest," inadequacy of rental may be of little relevancy unless it be gross enough to be "arbitrary and confiscatory." On the issue of "breach of trust" the slightest inadequacy, the fixing of any rate of rental less than the maximum obtainable, is not only relevant, but is sufficient in equity to set aside the transaction.

This Court will decide whether the Commission's order was rendered without any evidence to support it or is incompatible with the evidence (*Florida E. C. R. Co.* v. *United States,* 234 U. S. 167, 185; *Chestnut Ridge Ry. Co.* v. *United States,* 248 Fed. 791, 802), or is arbitrary, confiscatory or unreasonable (*I. C. C.* v. *U. P. R. R.,* 222 U. S. 547, cited *supra*). Although the Commission finds the acquisition to be in the public interest, "it may not approve the lease unless it further finds the consideration, terms and conditions thereof are just and reasonable—just as to the lessor, the lessee, and necessarily to the stockholders of each." *Cleve., C. C. & St. L. Ry. Co.* v. *Jackson,* 22 Fed. (2d) 509, 510-511, cited *supra.*

As majority stockholder in both the Big Four and the Michigan Central, the New York Central stood in the rela-

tion of trustee to the minority stockholders, and its fiduciary duty forbade the taking of any advantage whatever. As such fiduciary, the lessee, as already remarked, was not even authorized to enter into these leases at all except upon the very best terms obtainable from any other lessee, nor for any less than the utmost it would itself be willing to pay rather than that another should become the lessee. *Geddes* v. *Anaconda Copper Mining Co.*, 254 U. S. 590, 595-596, 598, 599; *Southern Pacific Co.* v. *Bogert*, 250 U. S. 483, 487-488; *Jackson* v. *Ludeling*, 21 Wall. 616, 625; *Wheeler* v. *Abilene Nat. Bank Bldg. Co.*, 159 Fed. 391, 393-394; *Jones* v. *Missouri-Edison Electric Co.*, 144 Fed. 765 (C. C. A., 8th Circ.); certiorari denied, 229 U. S. 615; *Ervin* v. *Oregon Ry. & Nav. Co.*, 27 Fed. 625, 631; *Kavanaugh* v. *Kavanaugh Knitting Co.*, 226 N. Y. 185, 195-196; *Farmers Loan & T. Co.* v. *N. Y. & N. R. Co.*, 150 N. Y. 410, 430, 431; cited to this point in *Boyd* v. *New York & H. R. R. R. Co.*, 220 F. 174, 181; *Hyams* v. *Calumet & Hecla Mining Co.* (C. C. A., 6th Circ.), 221 Fed. 529, 537.

In the *Farmers Loan & Trust Case, supra,* it is said (p. 945) that "where the majority are interested in another corporation, and the two corporations have contracts between them, it is fraudulent for that majority to manage the affairs of the first corporation for the benefit of the second." And in the *Geddes Case, supra,* the opinion declares that (p. 599) "transactions between boards having common members are regarded as jealously by the law as are personal dealings between a director and his corporation, and where the fairness of such transactions is challenged, the burden is upon those who would maintain them to show their entire fairness." *Cf. Pa. Canal Co.* v. *Brown*, 235 Fed. 669, syl. 3 (C. C. A., 3rd Circ.).

Yet the District Court held in the case at bar (R. 194) that "The public interest is the paramount consideration, and, although the interests of stockholders must not be ignored" (citing *Cleve., C. C. & St. L.* v. *Jackson, supra*), "the plaintiff has in our judgment failed to prove its claim of gross inadequacy."

This is clearly erroneous, not only in its allocation of the burden of proof and in its intimation—in face of the relations of the parties—that no inadequacy of consideration which is not "gross" will suffice for the relief demanded, but also in finding that public interest in any wise condones the breach of fiduciary duty owed by this volunteer lessee. The truth is rather that so long as such transactions are not compelled by statute they cannot be authorized without a fulfillment of the fiduciary duty as well as conformity with the public interest. The Commission's report (R. 82) and the District Court's opinion (R. 194) both refer to the provisions of the leases (Art. III) for the purchase by lessee of minority stock in the lessor companies at a valuation determinable by arbitrators, which "appear to furnish adequate means for equitable adjustment of grievances of dissatisfied minority stockholders." But aside from the oppressiveness of the offered alternative, namely, that of either accepting the fixed rental-dividend of only half the (1925-1929) average annual net earnings per share, or else of selling such stock at a price fixed by arbitration, the option itself is illusory, for the arbitration provision had already expired by its own express limitation pending the present suit to test the lawfulness of the Commission's orders and before the said opinion of the District Court was rendered. And this again—an unduly short limitation—is incompatible with the Commission's finding that the consideration, terms and conditions of the leases are just and reasonable.

Probably no skill in selecting and correlating general railroad and stock market statistics, nor any rule for estimating investment values from comparisons of the ratios or proportions of the four classes of data—net earnings, dividends declared, market quotations (seldom or never available for lessors' stock), and equities per share—by collating the lessors' data with the same for other major carriers, could have wholly prevented or greatly lessened the sharp variance of results, as between the Big Four and the Michigan Central, reached by the expert figuring (R. 82, 194) offered in support of the rental-dividends proposed for the minority

stockholders of those companies respectively. Reliable or consistent conclusions can never thus be reached. But the acceptance of such rule-of-thumb and tipster methods by the Commission and by the District Court, and their casual comments thereon, must appear to those investors—and to this Court—like inconsiderate trifling with their interests. For example (R. 82), "The differences in the ratios, as between the Big Four and the Michigan Central, would seem to give effect in some measure to the history of the carriers as to earnings." And again (R. 194), "Although the average net earnings exceed the rentals guaranteed, the latter cannot be held inadequate, for accumulation of surplus is essential in railroad financing."

If a surplus to be built up out of future undistributed net earnings were to be expended for betterments which lessors would ultimately get back, their stockholders' forbearance would receive only partial compensation since the use of their money in the interim would be without interest. But inasmuch as the lessors are charged by the lessee with the cost of all future betterments, what possible justification is there for withholding from them permanently half the net earnings, the whole of which have hitherto enured to them either in dividends or in surplus profitably employed?

In these circumstances it is submitted that the consideration, terms and conditions of the leases are not just and reasonable; that they are unjust to the stockholders of the lessor corporations; that they constitute a breach of fiduciary duty owed by the lessee to said stockholders; that the dividend-rentals are wholly incommensurate with the demonstrated earning powers and with the property valuations of the respective lessor railroads; that the imposition upon their stockholders of such fixed and inflexible rental-dividends is confiscatory; and that the findings of the Commission in respect to the consideration, terms and conditions of the proposed leases is without evidence, incompatible with the conceded facts, and is both arbitrary and unreasonable, transcending the Commission's power and authority.

POINT VII.

The Commission was without power to condition its authorization upon the acquisition of the burdensome short lines, for which the New York Central and Big Four had not applied, and to which they objected and protested; and the orders embodying and enforcing such condition are also arbitrary and confiscatory as to this appellant.

The applications made to the Commission by the New York Central and the Big Four related merely to the leasing of properties which were already a part of the New York Central system; they did not involve the building up of an enlarged system. The New York Central did not apply for authority to acquire any of the short lines; it opposed those interventions. The short lines have been operated at a loss. To acquire and operate them would impose a heavy financial burden upon the New York Central and its stockholders, and would sensibly impair its ability to earn and pay the unsecured rental-dividends to the lessor companies' stockholders. The condition was coercive and confiscatory.

There was also no power in the Commission to impose this condition in proceedings under Section 5 (2). Paragraphs (4) to (6) afford the sole source of such power. Approval of a proposed consolidation under the nation-wide plan may be conditioned upon its being made more inclusive to conform with such plan. But the plan had not yet been promulgated. The Commission's authority under Section 5 (2) is to "approve and authorize such acquisition, under such rules and regulations and for such consideration and on such terms and conditions as shall be found by the Commission to be just and reasonable in the premises." All these expressions, "consideration," "rules and regulations," and "terms and conditions," have reference to one and the same subject-matter, "such acquisition"; that is to say, the acquisition for which approval and authorization are sought. Such was in

substance the position taken by the New York Central before the Commission in resisting the interventions of the short lines; and we deem it unanswerable.

Acquisition of control by lease or otherwise must not involve a consolidation. No consolidation could be approved by the Commission before the adoption of its ultimate plan. Then any consolidation must of course take in the tributary weak lines in order to be "in harmony with and in furtherance of the complete plan." The Act nowhere confers on the Commission any authority to anticipate the complete plan by compelling a proposed lessee to acquire burdensome short lines, not applied for or wanted, as a condition precedent to the granting of its authority for the leasing of roads described in the applicant's petition.

> "Admittedly each part of the order must be authorized by the statute, or not at all. Obviously the terms and conditions of its order must be germane to the subject-matter, and fairly within the powers expressly delegated. The Commission as a statutory body cannot under the guise of administering this or any other provision of the law draw to itself any powers not conferred upon it by the act.
>
> The Commission is a body of limited jurisdiction. It may not directly exercise power, grant of which has been withheld by Congress (citations). Owing its existence and its power to statutory enactment, it may not, by conditions subsequent attached to its approval, force a party before it to impound with its funds which do not enter into the issuance of securities, the consideration for which it finds to be adequate. Its power to regulate cannot be so exercised as to advance any policy which does not have its origin in the statute." *Chicago, M., St. P. & P. R. Co.* v. *United States*, 33 Fed. (2d) 582, 587; aff'd *United States* v. *Chicago, M., St. P. & P. R. Co.*, 282 U. S. 311.

In *Interstate Commerce Commission* v. *United States*, 280 U. S. 52, it was held that the Commission had no power to require interstate carriers to abandon their existing stations and terminal tracks in a city and to combine for the purpose

of establishing in lieu thereof a new union station at a new site. In the course of the opinion, the late Chief Justice Taft said:

> "If Congress had intended to give an executive tribunal unfettered capacity for requisitioning investment of capital of the carriers and the purchase of large quantities of land and material in an adverse proceeding, we may well be confident that Congress would have made its meaning far clearer and more direct than in the present meager provisions of the Transportation Act."
>
> *Cf. Oregon-Washington R. R. & Nav. Co.* v. *United States,* 47 Fed. (2d) 250.

It is submitted that it was beyond the power of the Commission to require the acquisition of the short lines as a condition of its approval of the acquisition sought, and that its orders embodying and enforcing said condition are, although the applicants protestingly submitted thereto, arbitrary and confiscatory as to this appellant. For the case is not one where the corporation in its lawful voluntary acts is presumed to represent its stockholders, but is one rather where the latter have a separate and direct investor's interest in burdens which the Commission by its unauthorized orders imposes upon their corporation *in invitum.* And the same is of course true of appellant's right and interest (arising, in respect to the rental-dividends and their security, out of the same proceeding) in its capacity of a stockholder in each of the lessor corporations and, as such, an involuntary creditor of the New York Central. No opportunity to reconsider the leases has been afforded to the stockholders of any party thereto since the lessee became thus overburdened.

POINT VIII.

The leases not being authorized by the Ohio statute, but being in violation thereof, the assumption of obligation and liability thereunder was not for a lawful object within the corporate purposes of the New York Central, and the Commission was without power to authorize such assumption.

The assumption of obligations is governed by Section 20a (2), which in part provides: "The Commission shall make such order only if it finds that such issue or assumption: (a) is for some lawful object within its corporate purposes * * *." Paragraph (7) provides in part, "a carrier may issue securities and assume obligations or liabilities in accordance with the provisions of this section without securing approval other than is specified herein."

This language is in significant contrast with that of Section 5 (6) (c), which provides that a consolidation, when approved and authorized by the Commission, may be effected, "the law of any State or the decision or order of any State authority to the contrary notwithstanding." A like provision is employed verbatim in Section 13 (4) relative to the correlating of rates, etc., "in intrastate commerce on the one hand and interstate or foreign commerce on the other hand."

Section 20a does not however assume to override State corporation laws, but merely to supplant the supervisory jurisdiction of State commissions by that of the Interstate Commerce Commission and to substitute for multiple and conflicting regulation by local public utility and blue sky authorities the exclusive and plenary jurisdiction of a single Federal tribunal as paragraph (7) provides. The source of a railroad's corporate power in the premises is still to be found in the statutes of the State or States where it is incorporated or operated. That was true when it had to apply for approval to State commissions at every step of its financing. Only a clearly expressed intent of Congress, certainly

not to be read into Section 20a, would warrant the inference of a change in this respect. It is only where the language admits of no doubt, as in the contrasting phraseology above quoted, that the Commission may be deemed qualified to supersede the corporate powers which were derived by railroads from the States with new ones of its own originating.

The Transportation Act was drafted under jealous surveillance, so that every word and phrase was scrutinized from all angles and by every interest; and when new or changed corporate powers by railroads were in contemplation by all concerned or despite opposition, as in the cases referred to of consolidations and intrastate rates, the language employed was apt and conclusive. Such superseding of State enabling acts is not the express intent of Section 20a. Only by implication can such intendment be elicited. But by collating kindred clauses throughout the Act it becomes apparent that mere implication cannot suffice. The will of Congress, moreover, needs to be most explicitly pronounced to overthrow the inveterate tradition voiced by this Court in *Louisville & N. R. Co.* v. *Kentucky,* 161 U. S. 677, 702, cited *supra,* that "In the division of authority with respect to interstate railways, Congress reserves to itself the superior right to control their commerce and forbid interference therewith; while to the states remains the power to create and to regulate the instruments of such commerce, so far as necessary to the conservation of the public interests."

Section 20a has then but two objectives, both express; namely, to dispense with the consents of State commissions and officials, and to require the approval of the Interstate Commerce Commission, for all security issues and other financing commitments by carriers that are subject to its jurisdiction. Paragraph (2) thus provides that "It shall be unlawful for any carrier to issue * * * or to assume any obligation or liability * * * even though permitted by the authority creating the corporation, unless and until, and then only to the extent that * * * the Commission authorizes such issue or assumptions."

In the phrase "even though permitted," etc., the sense obviously is that although the carrier is empowered by the laws of its own State and is given leave by the State's railroad commission to exercise such power by taking the action proposed, it must still obtain the Interstate Commerce Commission's approval before doing so. And paragraph (7) makes "other approval" unnecessary. But there is manifested no legislative intent to permit authorization by the Commission of any railroad financing without pre-existing corporate power in the applicant to do that which the Commission is asked to approve. On the contrary, paragraph (2) prescribes that any issue of securities or assumption of obligation or liability shall be "for some lawful object within its corporate purposes."

It is clearly not for such an object, nor is it within such purposes, as the same are defined and limited by the Ohio statutes providing for the creation and regulation of railroad companies (cited *supra*, Point III), that the New York Central Railroad Company, incorporated and operated in that State and subject to its laws, assumes the obligation and liability to pay to the minority stockholders of the lessor companies, as rent for the leased railroads, which are likewise situate in part in the same State, an amount or rate of rental less than the laws thereof permit and enjoin. The General Code of Ohio, Section 8809 (cited *supra* with the original act), expressly limits the corporate power of railroad companies to make or take such leases, by annexing to the grant of such power the proviso that "the rental reserved and secured for the leased road shall be equal at least to its net earnings for the fiscal year next preceding the one in which the lease is made."

These leases do not meet that statutory requirement and they were not within the corporate powers of the parties thereto. The making of an *ultra vires* and unlawful lease cannot legitimately come within the New York Central's "corporate purposes." The assumption of obligation and liability to pay direct to lessors' stockholders the rental so unlawfully reserved, is not the description of "some lawful

object." The District Court points out that in the progress of the Transportation Act through Congress the word "purposes" was substituted for "powers," and holds, therefore, that "this is not a limitation based upon the charter powers of the corporation." But what change of meaning was actually accomplished by the substitution? In *Wilbur, Secretary of the Interior,* v. *United States ex rel. Vindicator Consol. Gold Mining Co.,* 284 U. S. 231, 237, it is held that where the language and meaning of the statute are clear, it is not permissible to resort to the legislative history as an aid to construction. Can a corporation have purposes outside of its powers? What else is a corporation but a congeries of powers, with a sole or aggregate membership to exercise the same?

The Commission's order includes *pro forma* the jurisdictional finding that the applicant's assumption is for some "lawful object within its corporate purposes"; but, as already noted, the accompanying report referred to by the order recites: "Whether or not the New York Central, the Michigan Central, and the Big Four have corporate capacity under the Ohio statutes to execute the proposed leases is dependent upon construction of the statutes. Pending such construction by a court of competent authority, we feel that we may accept the opinion of applicant's counsel." The Commission's position with respect to the limitations imposed by State legislation on the issuing of railroad securities had already been declared in *Capital Stock of Pittsburgh & W. Va. Ry.,* 82 I. C. C. 704, to be "that in this matter we should be governed by the policy of the State law."

The finding and orders here made by the Commission, Finance Docket No. 7744, *Assumption of Obligation & Liability by New York Central;* F. D. No. 7745, *Assumption of Obligation & Liability by Cleveland, C., C. & St. L. Ry. Co.,* 158 I. C. C. 317, in respect of Michigan Central and Cleveland, C., C. & St. L. Railway, are without evidence of the jurisdictional facts and are contrary to law, and the said orders were unauthorized and beyond the power of the Commission.

CONCLUSION.

The decree of the District Court should be reversed, with directions that each of the orders under consideration be annulled and set aside and the *status quo ante* restored.

It will doubtless appear that since this suit was commenced the leases have been executed. That, however, is no obstacle to the granting of relief herein. The Court, having properly acquired jurisdiction of the subject-matter, will retain jurisdiction for the purpose of granting full relief. *McGowan* v. *Parish,* 237 U. S. 285, 296; *Peirce* v. *New York Dock Co.,* 265 Fed. 148, 158 (C. C. A., 2nd Cir.); *Moore* v. *New York Cotton Exchange,* 296 Fed. 61 (C. C. A., 2nd Cir.), affd. 270 U. S. 593.

And it is competent for this Court by its decree to restore the *status quo. Chicago Junction Case,* 264 U. S. 258, 269-270, cited *supra.*

In the case last cited, objection was made that plaintiffs had improperly joined with the suit to set aside an order of the Interstate Commerce Commission, a suit to restore the *status quo.* It was urged that the United States, a necessary party, could be sued only as Congress consented, and that the consent given by the statute does not extend to a suit in which it is sought to set aside both the order and rights acquired by private persons thereunder. The Court said:

> "There is nothing in the legislation to indicate that Congress intended such a limitation of the scope of the relief to be afforded. * * * To permit the joinder objected to could not prejudice the United States. To prohibit the joinder would, in large measure, defeat the very purpose of the bill, and would clearly prevent that expedition in affording relief which it was the purpose of Congress to insure. * * * If this suit had been brought by the United States, the court would have given the complete relief prayed for (citations). The same rule should apply where the suit to set aside is brought by a private party."

Here, both petition and supplemental bill pray, as authorized by subdivision 28 of Section 41, Title 28, United States Code, that the carrying out of the respective orders be enjoined. They also pray for other and further relief. Equity adapts its relief to the situation existing when it makes its determination; and the prayer for relief is sufficient to authorize the granting of full relief in the premises. Refusal, on annulling the orders, to direct restoration of the *status quo* "would, in large measure, defeat the very purpose of the bill."

Respectfully submitted,

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APPENDIX.

Statutes.

Pertinent provisions of the Interstate Commerce Act (24 Stat. 379), as amended by the Transportation Act, 1920 (41 Stat. 456), are as follows:

Section 5 (U. S. Code, Title 49, Sec. 5):

(2) Whenever the Commission is of opinion, after hearing, upon application of any carrier or carriers engaged in the transportation of passengers or property subject to this Act, that the acquisition, to the extent indicated by the Commission, by one of such carriers of the control of any other such carrier or carriers either under a lease or by the purchase of stock or in any other manner not involving the consolidation of such carriers into a single system for ownership and operation, will be in the public interest, the Commission shall have authority by order to approve and authorize such acquisition, under such rules and regulations and for such consideration and on such terms and conditions as shall be found by the Commission to be just and reasonable in the premises.

(3) The Commission may from time to time, for good cause shown, make such orders, supplemental to any order made under paragraph (1) or (2), as it may deem necessary or appropriate.

(4) The Commission shall as soon as practicable prepare and adopt a plan for the consolidation of the railway properties of the continental United States into a limited number of systems under such plan, competition shall be preserved as fully as possible and wherever practicable the existing routes and channels of trade and commerce shall be maintained. Subject to the foregoing requirements, the several systems shall be so arranged that the cost of transportation as between competitive systems and as related to the values of the properties through which the service is rendered shall be the same, so far as practicable, so that these systems can employ uniform rates in the movement of competitive traffic and under efficient

management earn substantially the same rate of return upon the value of their respective railway properties.

(5) When the Commission has agreed upon a tentative plan, it shall give the same due publicity and upon reasonable notice, including notice to the Governor of each State, shall hear all persons who may file or present objections thereto. The Commission is authorized to prescribe a procedure for such hearings and to fix a time for bringing them to a close. After the hearings are at an end, the Commission shall adopt a plan for such consolidation and publish the same; but it may at any time thereafter, upon its own motion or upon application, reopen the subject for such changes or modifications as in its judgment will promote the public interest. The consolidations herein provided for shall be in harmony with such plan.

(6) It shall be lawful for two or more carriers by railroad, subject to this Act, to consolidate their properties or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership, management, and operation, under the following conditions:

(a) The proposed consolidation must be in harmony with and in furtherance of the complete plan of consolidation mentioned in paragraph (5) and must be approved by the Commission.

(b) The bonds at par of the corporation which is to become the owner of the consolidated properties, together with the outstanding capital stock at par of such corporation, shall not exceed the value of the consolidated properties as determined by the Commission. The value of the properties sought to be consolidated shall be ascertained by the Commission under section 19a of this Act, and it shall be the duty of the Commission to proceed immediately to the ascertainment of such value for the properties involved in a proposed consolidation upon the filing of the application for such consolidation.

(c) Whenever two or more carriers propose a consolidation under this section, they shall present their

application therefor to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties sought to be consolidated is situated and the carriers involved in the proposed consolidation, of the time and place for a public hearing. If after such hearing the Commission finds that the public interest will be promoted by the consolidation and that the conditions of this section have been or will be fulfilled, it may enter an order approving and authorizing such consolidation, with such modifications and upon such terms and conditions as it may prescribe, and thereupon such consolidation may be effected, in accordance with such order, if all the carriers involved assent thereto, the law of any State or the decision or order of any State authority to the contrary notwithstanding.

(7) The power and authority of the Commission to approve and authorize the consolidation of two or more carriers shall extend and apply to the consolidation of four express companies into the American Railway Express Company, a Delaware corporation, if application for such approval and authority is made to the Commission within thirty days after the passage of this amendatory Act; and pending the decision of the Commission such consolidation shall not be dissolved.

(8) The carriers affected by any order made under the foregoing provisions of this section and any corporation organized to effect a consolidation approved and authorized in such order shall be, and they are hereby, relieved from the operation of the "anti-trust laws," as designated in section 1 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, and of all other restraints or prohibitions by law, State or Federal, in so far as may be necessary to enable them to do anything authorized or required by any order made under and pursuant to the foregoing provisions of this section.

Section 20a (U. S. Code, Title 49, Sec. 20a):

(1) That as used in this section the term "carrier" means a common carrier by railroad (except a street,

suburban, or interurban electric railway which is not operated as a part of a general steam railroad system of transportation) which is subject to this Act, or any corporation organized for the purpose of engaging in transportation by railroad subject to this Act.

(2) From and after one hundred and twenty days after this section takes effect it shall be unlawful for any carrier to issue any share of capital stock or any bond or other evidence of interest in or indebtedness of the carrier (hereinafter in this section collectively termed "securities") or to assume any obligation or liability as lessor, lessee, guarantor, indorser, surety, or otherwise, in respect of the securities of any other person, natural or artificial, even though permitted by the authority creating the carrier corporation, unless and until, and then only to the extent that, upon application by the carrier, and after investigation by the Commission of the purposes and uses of the proposed issue and the proceeds thereof, or of the proposed assumption of obligation or liability in respect of the securities of any other person, natural or artificial, the Commission by order authorizes such issue or assumption. The Commission shall make such order only if it finds that such issue or assumption (a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose.

(3) The Commission shall have power by its order to grant or deny the application as made, or to grant it in part and deny it in part, or to grant it with such modifications and upon such terms and conditions as the Commission may deem necessary or appropriate in the premises, and may from time to time, for good cause shown, make such supplemental orders in the premises as it may deem necessary or appropriate, and may by any such supplemental order modify the provisions of any previous order as to the particular purposes, uses, and extent to which, or the conditions under which, any securities so theretofore authorized

or the proceeds thereof may be applied, subject always to the requirements of the foregoing paragraph (2).

(4) Every application for authority shall be made in such form and contain such matters as the Commission may prescribe. Every such application, as also every certificate of notification hereinafter provided for, shall be made under oath, signed and filed on behalf of the carrier by its president, a vice president, auditor, comptroller, or other executive officer having knowledge of the matters therein set forth and duly designated for that purpose by the carrier.

(5) Whenever any securities set forth and described in any application for authority or certificate of notification as pledged or held unencumbered in the treasury of the carrier shall, subsequent to the filing of such application or certificate, be sold, pledged, repledged, or otherwise disposed of by the carrier, such carrier shall, within ten days after such sale, pledge, repledge, or other disposition, file with the Commission a certificate of notification to that effect, setting forth therein all such facts as may be required by the Commission.

(6) Upon receipt of any such application for authority the Commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which the applicant carrier operates. The railroad commissions, public service or utilities commissions, or other appropriate State authorities of the State shall have the right to make before the Commission such representations as they may deem just and proper for preserving and conserving the rights and interests of their people and the States, respectively, involved in such proceeding. The Commission may hold hearings, if it sees fit, to enable it to determine its decision upon the application for authority.

(7) The jurisdiction conferred upon the Commission by this section shall be exclusive and plenary, and a carrier may issue securities and assume obligations or liabilities in accordance with the provisions of this section without securing approval other than as specified herein.

Provisions of State Constitutions and Statutes.

ILLINOIS.

CONSTITUTION, ARTICLE XI, SECTION 11:

No railroad corporation shall consolidate its stock, property or franchises with any other railroad owning a parallel or competing line.

CHAPTER 114 OF ILLINOIS STATUTES, PARAGRAPH 36:

All railroad companies now organized, or hereafter to be organized, under the laws of this state, which now are, or hereafter may be, (1) in possession of and operating in connection with or extension of their own railway lines, any other railroad or railroads in this state, or in any other state or states, (2) or owning a majority of the stock of any other railroad or railroads in this state or in any other state or states, (3) or owning and operating a railroad which connects at the boundary line of this state with a railroad in another state, are hereby authorized and empowered * * * to purchase and hold in fee simple or otherwise, and to use and enjoy the railroad property, corporate rights and franchises of the company or companies owning such other road or roads, * * * and provided further that no railroad corporation shall be permitted to purchase any railroad which is a parallel or competing line with any line owned or operated by such corporation.

INDIANA.

ACTS OF 1913, PAGE 462 (in force June 1, 1913):

PAR. 13209 (5339a). *Purchase or lease of connecting roads.*—1. (a) Whenever a railroad company, organized under the laws of this state, or under the laws of this state and another state or states, and being a citizen of this state, shall be in possession, by ownership or lease, of a railroad forming a through line with, or which is connected with, a

railroad belonging to or held under lease by a railroad company organized as aforesaid, then either of said companies so organized may sell and convey said railroad so possessed by it, or any part thereof, to said other company so organized * * * or may lease to said other company such railroad or any part thereof * * *. And provided, further, That this act shall not be construed so as to permit any railroad company to purchase or lease any competing line of railroad in this state. * * *

(b) A railroad company organized under the laws of this state, or under the laws of this state and another state or states, may lease its railroad in this state to a railroad company organized under the laws of another state or states whose railroad forms a through line or which is connected with the railroad of the company organized as aforesaid under the laws of this state, or of this state and another state or states, * * *. And provided, further, That this act shall not be construed so as to permit any such railroad company to lease any competing line of railroad in this state.

MICHIGAN.

CONSTITUTION, ARTICLE XII, SECTION 8:

No railroad corporation shall consolidate its stock, property or franchises with any other railroad owning a parallel or competing line.

COMPILED LAWS, CHAPTER 159, PARAGRAPH 8263:

Any railroad company in this State forming a continuous or connecting line with any other railroad company may consolidate with such other Company, either in or out of this State or partly within or partly without this State into a single corporation: "Provided, That no such companies owning parallel or competing lines shall be permitted to consolidate themselves into one corporation * * *."

COMPILED LAWS, CHAPTER 159, PARAGRAPH 8435, SECTION 1:

It shall be lawful for any railroad company organized or that may be organized, under the laws of this state, to sell, lease and convey its road, together with the rights and franchises connected therewith, or any part or portion thereof, to any other railroad company, whether organized within or without this state, and to acquire by lease or purchase from the owner of any other railroad such road, together with the rights and franchises connected therewith, or any part or portion thereof, whether located within or without this state; and for the railroad company so purchasing or leasing to acquire and use such road rights, and franchises, by purchase of the stock or otherwise, as may be agreed between the parties interested, said railroads not having the same terminal points, and not being competing lines.

OHIO.

70 OHIO LAWS 129 (4 Sayler 2950), *passed April 15, 1873, and being "An Act to amend section twenty-four of an act entitled 'An act to provide for the creation and regulations of incorporated companies in the State of Ohio, passed May 1st, 1952 (Swan & Critchfield, page 271), and supplementary to said act.'"*

SECTION 24. Any railroad company heretofore or hereafter incorporated, may at any time, by means of subscription to the capital stock of any other company or otherwise, aid such company in the construction of its railroad for the purpose of forming a connection of said last mentioned road with the road owned by the company furnishing said aid, where the road of the company so to be aided does not form a competing line; or any railroad company organized in pursuance of law may lease or purchase any part or all of any railroad constructed by any other company, if said companies' lines of said road are continuous or connected, and not competing, as aforesaid, upon such terms and conditions as may be agreed upon between said companies respectively,

or any two or more railroad companies whose lines are so connected, and not competing, may enter into any arrangement for their common benefit, consistent with and calculated to promote the objects for which they were created: Provided, that no such aid shall be furnished, nor any purchase, lease or arrangement perfected until a meeting of the stockholders of each of said companies shall have been called for that purpose by the directors thereof, on thirty days' notice to each stockholder, at such time and place and in such manner as is provided for the annual meetings of said companies, and the holders of at least two-thirds of the stock of each company, in person or by proxy, shall have at such meeting assented thereto; and provided, that in case of the lease of any railroad situate in whole or in part within this state, the rental reserved and secured for said leased road shall be equal at least to the net earnings of such leased road for the fiscal year next preceding the one in which said lease is made.

(The foregoing amendment to the original corporation code of Ohio became, when codified in the Ohio Revised Statutes of 1880, Sections 3300 and 3301, and when again codified, in the General Code of Ohio, Sections 8806 to 8809.)

GENERAL CODE, SECTION 8807:

A company may lease or purchase any part or all of a railroad constructed, or in course of construction by another company, if the lines of their roads are continuous or connected, and not competing, upon terms agreed upon between the companies.

GENERAL CODE, SECTION 8809:

No such aid shall be furnished, nor any purchase or lease perfected, until a meeting of the stockholders of each of the companies has been called for that purpose by the directors thereof, on thirty days' notice to each stockholder, at such

place and in such manner as is provided for the annual meetings of the companies, and the holders of at least two-thirds of the stock of each company, in person or by proxy, at such meeting, assent thereto. In case of the lease of a railroad situate in whole or part within this state, the rental reserved and secured for the leased road shall be equal, at least to its net earnings for the fiscal year next preceding the one in which the lease is made.

GENERAL CODE, SECTION 8813:

No company shall lease its road or any part thereof to another company, whether of this or any other state, as hereinbefore provided, unless the lessor receives full and adequate security for the payment of the rental and for the preservation of its property in as good condition as on entering into possession thereof. If the lessee fails to pay such rental promptly when due, such lease shall be void, at the option of the lessor. The company to whom a railroad is leased, if a corporation of any other state, shall be subject to all the restrictions, disabilities, and duties of a railroad company incorporated within this state.

GENERAL CODE, SECTION 9027:

No railroad corporation shall consolidate its stock, property or franchises of such corporation with or lease or purchase the works or franchises of or in any way control any other railroad or canal corporation owning or having under its control a parallel or competing line.